Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1949

No. 9628

Agenda No. 4

CLARENCE HAMMER, MAE HAMMER, JOYCE BRANDT and GEORGE BRANDT,
Plaintiffs-Appellees,

vs.

WALTER C. SHAFFER,
Defendant-Appellant.

WALTER C. SHAFFER,
Counter Claimant-Appellant,

vs.

CLARENCE HAMMER,
Counter Defendant-Appellee.

Appeal from the Circuit Court of Champaign County, Illinois.

O'Connor, J.

The plaintiffs, Clarence Hammer, Mae Hammer, Joyce Brandt and George Brandt, brought suit in the Circuit Court of Champaign County against the defendant, Walter C. Shaffer, to recover damages that they suffered as a result of an automobile collision on the 28th day of October, 1944. The defendant filed a counter-claim against the plaintiff Clarence Hammer, who was the owner and driver of the car in which the plaintiffs were riding.

The jury returned verdicts in favor of all of the plaintiffs and against the defendant, in the following amounts: Clarence Hamner, $350.00; Mae Hamner, $2500.00; George Brandt, $5000.00; and Joyce Brandt, $1500.00. The jury found against the defendant, Walter C. Shaffer, on his counter-claim, which was asserted against Clarence Hamner, one of the plaintiffs. From the judgments entered on such verdicts, the defendant appeals to this court.

A special interrogatory was given by the defendant, asking whether the defendant counter-claimant Shaffer was in the exercise of due care at the time of the collision, which interrogatory was answered by the jury "No".

The briefs and arguments filed by both sides, together with the record and the abstract thereof, are voluminous, and an exceptionally large number of errors were assigned and argued. We have considered them all and believe that all of the errors assigned fall within the points herein discussed and passed upon.

All of the parties had attended the Notre Dame-Illinois football game at Champaign, Illinois, and had just left the game when the accident occurred. With the large attendance at that football game, the traffic was heavy. Clarence Hamner, with the other plaintiffs as passengers, drove out of the parking lot southeast of the stadium, and at the direction of the traffic policeman, drove south about a quarter of a mile on a road owned by the University of Illinois, which was opened to the public that afternoon to aid the traffic going to and from the game. Hamner then turned west, still on the University of Illinois road, for about a quarter of a mile to the location of the accident.

The road the plaintiffs were driving was dry and dusty and was of cinder construction. As Hammer approached the road upon which the defendant was traveling in a southerly direction, he stopped or slowed down sufficiently to shift gears at about the east edge of the north and south road. There was evidence of some dust in the atmosphere from the traffic on both roads. None of the plaintiffs saw the defendant's automobile before the collision. However, Hammer testified that as he stopped he looked to his right and left, but could see to the north or his right, only about 100 feet because of the dust, and that he saw no car within that distance. After shifting into low gear, he proceeded west across the intersection, and as the front of his car was about across the intersection the defendant's car struck the Hammer car, slightly back of center on the right side. The Hammer car was pushed or knocked a distance of from 15 to 40 feet and stopped facing north.

The defendant, upon leaving the football game for his home, was following a line of cars south on South First Street. He testified that there was dust, but that it was no higher than the wheels of the car and did not obstruct the visibility as to the other automobile. There would, of course, be more dust in the vicinity of an intersection of two roads than there would be on just one road.

The defendant estimated his speed at from 30 to 35 miles per hour. As he approached the crossing where the collision occurred he looked to the left when he was about 50 feet north of the cross road. He then looked to the right when about 40 feet from the road. He then looked

straight down the road. It was as he looked to the right, about 40 feet north of the crossing, when he heard outcries from three of his passengers. He testified the Hammer car was then entering the intersection. The defendant does not know if his brakes were applied when the impact occurred or not. He does not know if he had tried to have the brakes take affect before the collision. At the speed he was traveling, and under the conditions, the defendant said he would require 80 to 85 feet to stop his car. In spite of that he looked to his left when only 50 feet from the cross road, admitting thereby that he looked for the first time to his left when he was at a distance from the road that was insufficient to permit him to stop should anything be coming from that direction. Obviously, very little is gained from looking to one's right or left for the first time when the person is so close to the intersection and traveling at a speed that will not permit him to stop his motor vehicle before reaching the crossing.

The appellant strongly contended that there was a fatal variance between the allegations of the plaintiffs' complaint and the proof presented in support thereof. That variance is that the complaint alleges that the accident occurred at the intersection of two highways, whereas the evidence shows that the plaintiffs were traveling on a private road. It seems clear that the roadway upon which the plaintiffs were traveling was a private roadway owned by the University of Illinois, but on that day was open to the general public because of the large number of automobiles going to and from the football game. The defendant claims that by virtue of this allegation in the complaint he was charged with notice

that the collision occurred at a legal intersection within the meaning of the word intersection as defined in the Illinois Statutes in the Uniform Motor Vehicle Act, Chapter 95½, Article I, Paragraph 110. The defendant further contends that this is vitally important because the duties of motorists existing at legal intersections are different than those created when approaching or driving over a private roadway, where the private roadway intersects the highway, as referred to in the Uniform Motor Vehicle Act, Chapter 95½, Article I, Paragraph 110. We are concerned with the question as to whether or not this variance is fatal.

Defendant offers the case of Cihal v. Carver, 334 Ill. App. 234, as authority for his position in regard to this variance. In this case the plaintiff was a pedestrian crossing the street at a point which she thought was a "cross walk". This cross walk then being used by this pedestrian was not at an "intersection" as defined by the Uniform Motor Vehicle Act, and the court therefore held that the defendant was not required to yield her the right of way and the rights and duties of the parties differed greatly, depending upon whether or not this pedestrian was actually upon a cross walk as defined by the Uniform Motor Vehicle Act of the State of Illinois.

We do not differ with the law in the Cihal case, supra, but we are of the opinion that it does not apply to the facts in this case. The case cited was tried and instructions were given on the theory that the plaintiff, the pedestrian, was on a cross walk at an intersection at the time of the accident, but evidence did not authorize that theory. This

is not true of the case at bar. While the complaint referred to the roadway being used by the plaintiff as a highway, the proof definitely established its true state and the case was tried on that basis. No instructions or arguments were given on the theory that the roadway was anything but a private road.

No one was misled by the description of the location of the accident here involved. All of the parties to this suit were present at the time of the collision. The defendant's evidence would not have been different, either as to his defense or the counter-claim, had the complaint alleged the plaintiff to have been on a public highway or a private roadway. A further reason that this variance is not material is the fact that under the Uniform Motor Vehicle Act of this state the rights and duties of the parties in this particular case were the same, regardless of whether the plaintiffs were traveling on a "private road" or were approaching an "intersection" from the left on a public highway.

It is the contention of the defendant that the plaintiffs fail to state a cause of action because they omitted to charge a violation of any duty or allege facts from which a duty owed by the plaintiff could be inferred. A careful consideration of the complaint in the light of that circumstance reveals a complete description of the position of the parties to this action at the time of the collision, the location of the automobiles, and a view of the land and intersection at the corner where the accident occurred, and that is followed by an allegation that the defendant at the time of the accident, did one or more of certain acts that amounted to negligence on his part and proximately caused the collision

and resulting injury and damage. These acts included certain violations of the Motor Vehicle Act of the State of Illinois. We know of no stronger method of implying a duty than by specifically pleading a violation of a then existing statute which imposes a legal duty on a defendant.

Appellant contends that the collision was caused entirely by the negligence of the plaintiff and counter-defendant, Clarence Hamner, in driving his automobile suddenly in front of the defendant at a time when he was so close that it was impossible for him to stop. That theory was offered to the jury, but was not adopted by them. The evidence shows that the jury could justly conclude that if the Hamner car appeared suddenly in front of the defendant, it could have been for the reason that the defendant was not keeping a proper lookout and had not looked to his left for automobiles traveling upon that roadway until he was too near to the cross roads to bring his car to a stop, should that be necessary. Regardless of the reasoning of the jury, we feel that there was ample justification for their reaching their conclusion.

We can conceive of the jury finding the defendant guilty of many acts of negligence that could have proximately caused the injuries. Speed was definitely a question for the jury. The fact that the defendant was traveling at the same rate as the other cars, did not conclusively settle the point of speed. The defendant states that three of his passengers saw the plaintiff's car and cried out before he saw the car himself, and that he was then about 40 feet from the intersection. He said further that the accident happened so rapidly that he could not say if he had his foot on the brake pedal or not. This, in the light of his further testimony that he was traveling at a speed and under conditions that would require a distance of 80 to 85 feet to stop, certainly makes the question of a proper

lookout a matter for the jury. This is especially true as to the claims of the plaintiffs who were passengers.

There was no abuse of discretion on the part of the court in refusing to admit evidence of experiments made with reference to visibility, on the grounds that conditions were different with reference to dust in the atmosphere. The testimony about the experiment was offered by a Civil Engineer who was familiar with the location of the accident. He was not present at the location when the accident occurred and he had no knowledge of the density of the dust. Evidence of experiments is not competent unless performed under circumstances very similar to those connected with the act illustrated. Smith v. Stover Manufacturing Co. 205 Ill. App. 169, at page 175.

We likewise feel that it was within the discretion of the trial judge, and there was no abuse of that discretion, to refuse to admit photographs marked defendants Exhibits 1, 9, 11 and 12. All of these photographs were of locations at least a quarter of a mile distant from the point of the collision. We are at a loss to see how the jury could have been aided by those photographs. The trial judge must have, and he does have, a wide discretion in determining the admissibility of pictures such as those, under the circumstances.

The defendant was restricted by the trial judge in the cross examination of Joyce Brandt, plaintiff, as to the payment of the gasoline used on the trip. The defendant apparently was attempting to determine if the plaintiffs were engaged in a joint enterprise. The theory of the restriction was that such questions were outside the scope of the direct examination.

The trial judge suggested that the defendant might claim the witness as his own. He could have examined her adversely under Section 60 of the Practice Act and secured all of the benefits that he could have enjoyed had he been permitted to follow that line of cross examination. The provisions of the Practice Act on depositions for discovery before trial are likewise intended to aid a litigant in the position of this defendant and to enlighten him on the facts.

The court did not prevent the defendant from proving the existence of a joint enterprise by restricting the cross examination. Had such a relationship existed among the plaintiffs it could have been proved by the defendant by the methods suggested by the trial judge and noted above.

It is further urged that the court erred in admitting certain medical testimony on behalf of the plaintiffs. The court permitted a physician to testify that in his opinion the blood in the urine of one of the plaintiffs was caused by trauma to the right kidney. The defendant contends that since his answer denies the injuries, no medical expert can give his opinion as to what caused the condition of the patient. In all of the cases cited by the defendant on this point there was more than a mere denial of the injuries in the pleadings, there was also evidence to support this dispute. In this case the defendant offered no medical testimony to dispute the injuries alleged, and certainly did not minimize the force of the impact of the two automobiles. Certainly it is not the position of the defendant that the collision was so insignificant that injuries such as are claimed could not have occurred. If such were the position of the defendant in both his pleadings and in his proof, then we would consider the cases of Kimbrough v. Chicago City Railway Company,

272 Ill. 71, at pages 75 and 76, and Gillette v. City of Chicago, 396 Ill. 619, at page 622, cited by the defendant, to be in point. The rule relied upon by the defendant must be restricted to such cases where the subject matter about which the expert witness desires to testify (as to the cause) is in full dispute both by the pleadings and the proof. In Kimbrough v. Chicago City Railway, supra, it was held to be error to permit an expert to testify in response to a hypothetical question that the tumor resulted "from the bruise - the injury to the breast" and the neurasthenia from the shock of the accident. However, in that case the dispute was evidenced by both the pleadings and the evidence. The proof of the plaintiff indicated a violent collision, while that of the defendant a slight shock.

We have considered all of the other points raised to the medical testimony, and do not find any reversible error.

Plaintiff's attorney, while cross-examining Clair B. Hull, a passenger in the defendant's car, asked the witness "were you the one that threw the bottle out of the car right after the accident?" The court sustained an objection and instructed the jury to disregard the remarks. Objection was also sustained to this question that followed "did you see a bottle thrown out of the car immediately after the accident - a whiskey bottle?" Later the court instructed the jury to disregard all the testimony with reference to the questions and answers with reference to liquor.

Before these questions were asked the witness had testified that he had a drink between noon and one P.M.

There was no positive testimony by anyone that a bottle of any type was thrown from defendant's car, and the asking of questions of this

type, in view of that, could very easily be concluded to be an attempt to get before the jury incompetent or even false testimony.

In the light of the answer made by the witness, the prompt action of the court in sustaining the objections and instructing the jury to disregard both the question and the answer, and the very nature of the question itself, it appears obvious that such conduct would not be helpful to the plaintiff, and did not deprive the defendant of a fair trial. Such trial tactics cannot be commended, but in the absence of such conduct resulting in an unfair trial, a reversal would not be in order.

There was no error in the court's refusal to give instruction No. 3 offered on behalf of the defendant and counter-claimant.

This instruction stated what the counter-complaint charged and included a paragraph explaining that the complaint or answer was not evidence. Usually this type of instruction is proper as it informs the jury of the issues of the case. However, to permit such an instruction here would confuse the jury and be misleading, because it included an inaccurate statement of the law in regard to the right of way of motor vehicles. The court said in Scott v. Vurdulas, 264 Ill. App. 495, at page 498, that to give an instruction on right of way in the statutory language without qualifications as to the circumstances, distances or speed, is error. The instruction complained of is of that nature and under the circumstances no error was committed in refusing to give the same.

The verdict on the counter-claim was entirely consistent with the other verdicts returned and the answer to the interrogatory signed by the jury. We find no error in accepting the same and entry of judgment thereon.

There is no reversible error in the record. The judgments on behalf of the plaintiffs-appellees and against the defendant-appellant are therefore affirmed.

Affirmed.

338 Ill. App.
Abs. Ab. 1
7-7-49

Abstract

No. 10290

In the Appellate Court of Illinois

Second District

October Term, A. D. 1948

1302

George Herbert Sykes,
Administrator of the
Estate of George Edward
Sykes, deceased,

Plaintiff-Appellant,

vs.

Georgiana Herbener, Administrator of the Estate of
Robert Herbener, deceased,

Defendant-Appellee.

Appeal from Circuit Court,
Du Page County

Honorable
Wm G. Knoch
Trial Judge

338 I.A. 20

BRISTOW, J.

This appeal coming from the Circuit Court of Du Page County arises as a result of an automobile accident wherein George Edward Sykes, a boy fourteen years of age, was killed. His administrator brought suit under the Injuries Act, making various charges of negligence against Robert Herbener, who also met his death in the accident, and who is represented in this proceeding by his mother Georgiana Herbener, administratrix. The jury returned a verdict of not guilty and judgment was entered thereon for defendant in bar of action and costs. Inasmuch as the appellant only assigns a single error to justify a reversal, namely; the giving of an erroneous instruction on behalf of the defendant, it will be unnecessary for this opinion to embrace the full factual situation surrounding the occurrences in question.

George Edward Sykes was riding in the rumble seat of an old 1929 Ford wherein three other boys were riding in the front seat and one other in the rumble seat with George. They were driving north at about 8:00 A. M. on Route 59, their destination being a golf club where they were all employed. Route 59 intersects Route 64 at right angles, the latter highway being a preferential thoroughfare.

The two highways are approximately level at the intersection and the view to the right on Route 64 from the stop sign was clear for 2100 feet. The stop sign for traffic going north on Route 59 was located 75 feet south of the center of Route 64.

The defendant's intestate was driving his 1938 Ford cabroilet in a westerly direction on Route 64. In the car with him were three other boys who were on their way to the Majestic Radio Company factory where they were all employed.

There was an automobile being driven by Marguerite Schwartz traveling north on Route 59, which had come to a complete stop just south of Route 64. In this car were three other ladies, all of whom were witnesses at the trial. They had stopped at the intersection to permit the defendant's car to pass. They all testified that the car in which plaintiff's intestate was riding did not come to a complete stop. Strangely, none of the boys surviving and who were riding in the Sykes car, saw the Herbener car coming west.

The Sykes car proceeded into the intersection into the path of the westbound automobile which was traveling at a rate of speed not to exceed 50 miles per hour and after the collision both cars wound up at the northwest corner of the intersection. The drivers of both vehicles received fatal injuries.

It is our belief that the record very clearly shows that the sole cause of this fatal accident was the failure of the driver of the car in which Sykes was riding to stop and permit the Herbener car to safely pass before proceeding across the protected highway.

As we have indicated, the only complaint that appellant presents on this appeal is the giving of the following instruction:

"The Court instructs the Jury that at the time of the occurrence in question in this cause there was in full force and effect and binding upon the parties to this cause a certain Statute of the State of Illinois, as follows:

'The Department may in its discretion and when traffic conditions warrant such action give preference to traffic

upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard surfaced road over traffic crossing or entering such highway by erecting appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway shall come to full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to vehicles upon such highway.'

"And you are further instructed, if you find from the preponderance of the evidence that the plaintiff's intestate, George Edward Sykes, was riding in an automobile which was then and there being driven along and upon State Highway No. 59, and that the Department of Public Works and Buildings of the State of Illinois, had, prior to the occurrence in question, in its discretion, given preference to traffic upon State Highway known as U. S. No. 64, and had before the occurrence in question erected an appropriate stop sign immediately south of U. S. Highway No. 64 and immediately east of State Highway No. 59, and if you further find from the preponderance of the evidence that the automobile in which the plaintiff's intestate was riding did not come to a full stop as near the right-of-way line of U. S. Highway No. 64 as possible, and regardless of direction give the right-of-way to vehicles upon such highway, and that the failure of driver of the plaintiff's intestate's automobile so to do was the sole proximate cause of the plaintiff intestate's death, and if you further find from a preponderance of the evidence that the defendant intestate Robert Herbener at and immediately before the occurrence in question, was in the exercise of ordinary care and caution, then the plaintiff can not recover in this suit."

On behalf of the plaintiff the following instruction was read by the trial court:

"The Court instructes the jury that while the law gives the right-of-way to a vehicle traveling on Route 64 at the intersection of Route 59, which said latter highway has on each side of the intersection, stop signs, facing drivers thereof, the law does not contemplate that such right might arise when the vehicle traveling on Route 64 is so far from the intersection at the time a car enters the intersection from Route 59, after having come to a stop before so entering, that with both vehicles being operated at a rate of speed that is reasonable and proper, taking into consideration the surroundings and circumstances the vehicle entering intersection from Route 59 on which said stop signs are so posted, will reach line of crossing before vehicle on Route 64 will reach the intersection. And if you believe from the preponderance of the evidence that at the time the automobile in which George Sykes, deceased, was riding entered the intersection in question, after having come to a stop, the automobile being driven by Robert Herbener, deceased, was so far from the intersection that with both vehicles being operated at a rate of speed that isreasonable and proper, taking into consideration the surroundings and circumstances the automobile in which George Sykes, deceased, was riding would reach the line of crossing before the automobile driven by Robert Herbener, deceased, would reach the intersection, then you are instructed that the automobile driven by Robert Herbener, deceased, did not have the right-of-way."

We are of the opinion that the instruction given on behalf of the defendant is free of error. The instruction given on behalf of plaintiff is bad. It was a correct right-of-way instruction, but

here the situation was entirely different. Route 64 was a perferential highway. It was the duty of the driver of the Sykes car to stop and not proceed into the intersection until he could safely do so. This instruction told the jury that if the driver of the Sykes car could reach the line of crossing prior to the Herbener car, the latter did not have the right-of-way. If the plaintiff had prevailed at the trial below, it would be the duty of this court to reverse because of this erroneous instruction. A fortiori we do not find any merit in appellant's claim of error that would justify reversal.

Judgment Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A. D. 1949

General No. 9640 Agenda No. 5

Everett Piggott, Plaintiff-Appellee, vs. William H. Newman, Defendant-Appellant. William H. Newman, Counter Plaintiff-Appellant, vs. Everett Piggott, Counter Defendant-Appellee.	Appeal from Circuit Court of Sangamon County

338 I.A. 198

Wheat, J.

This is an appeal from a judgment for plaintiff-appellee Everett Piggott against defendant-appellant William H. Newman in the sum of $432.20 and costs, entered upon jury verdict, in a case involving the collision of two automobiles at an intersection in Springfield, Illinois. Error is assigned in that the court refused to allow a motion, at the close of all the evidence, to direct a verdict in favor of the defendant, and in refusing to allow defendant's motion for judgment notwithstanding the verdict. Defendant's argument is based solely on the ground that there is no evidence of negligence on the part of the defendant upon which liability can be predicated.

The undisputed evidence showed that plaintiff was driving south on Spring Street, approaching Canedy Street, about 9:30 P. M. January 24, 1945.

Defendant was driving east on Canedy Street approaching Spring Street. All of the streets in Springfield were then in an icy condition. Spring Street was a through street and a stop sign was located about thirty feet west of the intersection on the south side of Canedy Street. Defendant knew that Spring Street was a through street. Defendant did not stop his car before entering the intersection, and a collision of the two cars occurred somewhere in the intersection. The amount of plaintiff's damages was stipulated as being $432.20.

In ruling on motions for a directed verdict or for judgment notwithstanding the verdict, a legal question arises as to whether, considering all the evidence in the light most favorable to the party prevailing in the trial court, together with all reasonable inferences thereon, there is evidence to support the verdict. Defendant testified that he knew of the icy condition of the streets as he had been driving during the evening and had occasion to apply his brakes and found that it was slippery, and that he knew Spring Street was a through street. His speed was such that by applying his brakes west of Spring Street he was unable to stop his car before the collision. Clearly the question of any negligence on the part of the defendant was one for the jury. The verdict in favor of plaintiff was not against the manifest weight of the evidence. Defendant has cited cases in Illinois and other jurisdiction holding that the skidding of a car in itself and unattended by prior negligence from which such skidding proximately results, does not constitute negligence. There is no quarrel with this rule, but it was for the jury to say whether under the circumstances the skidding was caused by negligent conduct of defendant.

It was not error for the Circuit Court to deny the motion for directed verdict and the motion for judgment notwithstanding the verdict, and the judgment of the trial court is accordingly affirmed.

Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

IN VACATION AFTER
MAY TERM, A. D. 1949

General No. 9654 Agenda No. 11

338 I.A. 198

George Huschen,
Plaintiff-Appellee,
vs.
Mary Huschen,
Defendant-Appellant.

Appeal from
Circuit Court of
Tazewell County

Wheat, J.

This is an appeal from an order denying leave to vacate a divorce decree. Plaintiff-appellee George Huschen filed his complaint for divorce on November 21, 1947, charging defendant-appellant Mary Huschen with desertion. Defendant by her former attorney filed her answer December 9, 1947, consisting of a general denial. The trial court set the cause for hearing on the merits January 9, 1948. There is some conflict as to what occurred January 8, 1948, but it appears that the secretary for defendant's former attorney telephoned the attorney for the plaintiff and stated that her employer "would not be available to try the case on the following day". On January 9, 1948, the cause was heard as scheduled, defendant not being present in person or by attorney, and a decree for divorce was entered finding defendant guilty of desertion. Thereafter on January 31, 1948, defendant by her present attorney filed her verified motion to vacate the same decree, for leave to amend her answer, and for leave to offer evidence in her behalf. This motion was sup-

ported by the affidavits of her former attorney and his secretary. On April 12, 1948, the court modified the decree by striking the statement that defendant appeared by her attorney, and then denied defendant's motion. Appeal was taken directly to the Supreme Court which for jurisdictional reasons, assigned the same to this Court.

The affidavit of Reba Leach, the secretary for defendant's former attorney, recites that she phoned plaintiff's attorney the day before the hearing and said that her employer would not be available to try the case the following day and requested a postponement; that such attorney said he would confer with the judge and report the situation. The affidavit of defendant's former attorney recites that upon filing the answer he advised plaintiff's attorney that he was representing defendant and would later confer with him; that he received a notice from plaintiff's attorney that the case was set for hearing January 9th at 10 A. M.; that prior to such date affiant was ill and had his secretary confer by telephone with opposing counsel requesting a continuance and was under the impression that the cause was continued; that thereafter he phoned counsel as to a new setting and was informed that a decree had been entered; that opposing counsel stated he had received a call from affiant's secretary and informed the court of the request for continuance, but the court advised him it would be perfectly in order to proceed with the hearing; that thereafter on January 15, 1948, he received a letter from plaintiff's counsel as to the transaction in which he stated he did not believe affiant was further interested in the case and for that reason proceeded to a decree.

Plaintiff filed a motion to strike defendant's motion, supported by the affidavit of attorney for plaintiff, which states that on or about December 30, 1947, he caused a notice to be sent toopposing counsel that the hearing had been set for January 9, 1948, at 10 A.M.; that on January 8th he received a telephone call from the stenographer

of defendant's counsel stating that the latter was unavailable and would not attend the hearing; that she did not explain the reason for the proposed absence of such attorney; that affiant told her her would inform the court of the conversation to the effect that her employer was unavailable, and would request the court to hear the evidence; that affiant made no statement of any kind or character that would cause said stenographer to believe that the cause would be continued, and that he proceeded with the hearing because no reason was given for the non-attendance of counsel at such hearing; that he made no statement to said stenographer that he would phone back in regard to any further steps in the proceedings; that affiant was led to believe that defendant's attorney did not care to do anything further in the proceeding and desired to be relieved from any further connection with the case.

In addition to these three affidavits, the trial judge had before him the verified motion of the defendant, MaryM. Huschen. The motion recites that summons was served upon her November 21, 1947; that on November 25th she took the copy of the summons to the attorney who later filed her answer, with the intent that he represent her in the case; that she had some acquaintance with the attorney for two years or more; that the conference lasted about five minutes, the attorney agreed to represent her and she gave him her residence telephone number; that she received no word directly or indirectly from her attorney so that on December 15th in response to a telephone call she was told by him that he had heard nothing about the case as yet but would advise her as soon as he learned anything; that she heard nothing from him directly or indirectly by January 5th at which time she phoned his office and was told by the secretary that he was not in the office but that she had heard nothing about the case. The motion further charges that not having heard anything from her attorney, on January 19th she went to his office and his stenographer again stated that he was not in and that she

should call again; that on January 21st she again went to the attorney's office and again he was not in; that she told the stenographer of a report that her husband got a divorce January 9th and the reply was "No, not then". She then states that she has had no further contact, directly or indirectly with the said attorney since January 21st; that she retained her present attorney January 26th, and obtained a copy of the divorce decree.

Although it may be said, generally, that the negligence of an attorney will be charged to the client, yet the State of Illinois is an interested party in every divorce case, by reason of which it is preferable that such a case be heard upon its merits. Defendant retained an attorney and relied upon his representing her. As far as she could do so, she tried to keep informed as to the progress of the case. The decree was entered January 9th; she retained her present attorney January 26th, and the motion to vacate was filed January 31st. This indicates diligence on her part.

It is the opinion of the Court that the motion to vacate the decree should have been allowed and that the Court erred in not so doing. Accordingly, the judgment of the Circuit Court is reversed and the cause remanded with directions to allow the motion to vacate the decree.

Reversed and remanded with directions.

43720

CUSUMANO SANCES, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
LOUIS D'ANGELO, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action for personal injuries against defendant. There was a trial by jury and a verdict for plaintiff for $6750.00, upon which judgment was entered, and defendant appeals.

Plaintiff was employed by the street railway company, in sweeping and cleaning the switches in the tracks leading to the car barn on Division Street, extending east from Western Avenue on the south side of Division Street. The eastbound tracks were connected with switches that extended through six bays into the car barn, these bays consisting of fourteen sets of tracks. It was the duty of plaintiff in the performance of his work to keep these switches clean. On October 27, 1941, at about daybreak, during his regular course of employment, he was in the street sweeping these switches, with his back to the west. It was the only practical position for him to be in to clean the switches. Defendant was driving his automobile, going east, and straddling the eastbound tracks, and while driving collided with plaintiff and injured him.

There are many questions raised by defendant upon this appeal. We shall only discuss those we regard as sufficiently important for our consideration.

After the jury had been selected to try the cause, it appears that two women jurors, who had been excused from the panel, left the courtroom and returned shortly thereafter, while the jury was in the jury box, intending to wait for one of the women jurors in the jury box to join them for lunch; that in the corridor leading to the courtroom, the assistant to plaintiff's attorney was seen talking to these excused women jurors, and it developed from a showing made that they asked if it was all right for them to return to the courtroom and wait for one of the women jurors, and that he told them it would be all right; that someone overheard one of the two excused women jurors say to the attorney's assistant, "I hope the defendant loses the case"; that these two women jurors were later seen with the woman juror hearing the case, who joined them out of the courthouse. From the showing it is suggested that there was misconduct justifying a mistrial. A motion made to withdraw a juror and to declare a mistrial was denied by the trial court. This alleged misconduct is now urged as ground for reversal. There was no showing of prejudice resulting, or that plaintiff's attorney or his assistant had any contact with the jurors hearing the case; nor any showing that either of the two women jurors in question had ever communicated her desire about the defendant losing the case to any of the jurors hearing the case. We think the trial court properly exercised its discretion in denying the motion for a mistrial.

It is urged that the witness Dr. Park, for the plaintiff, was permitted over objection to express an opinion as to the permanency of the injury; that no proper foundation was laid for such an opinion, nor was he the attending physician. It appears from the evidence that this witness was employed by the street car company; that it was his duty to examine injured employees periodically to determine when they were capable, if at all, to return to their usual work; that the witness had examined the plaintiff approximately every two weeks up to and including November 17, 1942; that he also took an X-ray of plaintiff on March 24, 1942; that these examinations were made for the purpose of determining whether plaintiff had sufficiently recovered, to resume work with the street car company; that the X-ray showed malposition and poor alignment of two or three fractures; that following the X-ray taken by him, he examined plaintiff frequently, and testified he found plaintiff had wasting of the leg and impairment of some motions of the knee and ankle; that the impairment existed as late as November, 1942, more than a year after the accident; and that he gave it as his opinion based on the length of time the impairment existed, that the injury was of a permanent character. The opinion was based on the "reasonable degree of certainty, from a medical and surgical standpoint." We think that the evidence sufficiently qualified him to express an opinion, and the form of the hypothetical question was not improper.

Defendant sought to introduce in evidence motion pictures taken of plaintiff after the accident, which the

court refused to receive. When the trial court asked defendant's counsel the theory for admitting them, counsel stated, "Well, with reference to the nature of the work. * * * And also the care of the man in watching traffic, and also in relation to the condition that he claims exists at the present time with reference to the injury. * * * If the Court please, I want to show these for the purpose of showing that the man is not suffering from the condition that he testified to--- * * * He says he has pains in his leg while he is working." The evidence disclosed that plaintiff returned to work. There was no claim made in the case that he could not use his limbs, nor any claim of incapacity as would permit of impeachment of plaintiff by these motion pictures. Certainly they could not reveal any evidence of pain or lack of pain. There was no materiality disclosed by counsel's response to the court's inquiry. We cannot say that the court committed error in refusing to receive the motion picture films.

It is claimed that the court refused to enforce a subpoena served on the Surface Lines to produce upon the trial its records listed in the subpoena. The subpoena called for a very large list of documents and records and might properly be referred to as an omnibus subpoena. The trial started October 11, 1945. The next day was a legal holiday, and it was on this holiday that the defendant served the subpoena on the paymaster of the Surface Lines, requiring production of the vast number of documents and records the following morning. It appears that a literal compliance with the subpoena would require the production of some 90

volumes of records of the Surface Lines. There was no reasonable effort made before trial to take the deposition of the paymaster or to afford the company a reasonable opportunity at reasonable hours to submit the records to defendant for inspection, as provided in Supreme Court Rule 17, paragraph 8. Under the circumstances, we do not regard the ruling of the court as improper.

Defendant argues that the evidence discloses plaintiff to be clearly guilty of contributory negligence, and that the court should have directed a verdict upon that ground. There is a difference in the position of one who is required to work in the streets and a pedestrian using the street, in determining the question of contributory negligence. One working in the street is not expected to keep his head raised to be constantly on the lookout for traffic. Were he required to do so, he would not be performing his duties in connection with his work. Drivers of automobiles should be on the lookout and exercise a reasonable degree of care to prevent colliding with one required to work in the streets, whose very presence at work should be a warning to the driver. There is no reasonable explanation offered by defendant, who claims that at the time of the accident it was still dark, and he could not and did not see plaintiff, why, if his headlights were burning and threw a light the distance ahead of the car required under the Motor Vehicle Act, he could not have seen plaintiff at work. A similar situation was involved in Carneghi v. Gerlach, 208 Ill. App. 340, where the court held that it was a question

of fact for the jury to determine whether plaintiff was guilty of contributory negligence, and whether defendant was guilty of negligence in failing to see the plaintiff at work in the street. To the same effect is Sheppard v. Cummings, 324 Ill. App. 227 (Abst.).

It is suggested that the verdict is excessive. We do not think so. Ford v. Friel, 330 Ill. App. 136, and cases there cited.

Complaint is made of the giving of plaintiff's instructions Nos. 3, 4 and 5. These instructions merely quoted the pertinent sections of the statute relied upon in the complaint. These instructions, when read with plaintiff's given instruction No. 1, obviate the complaint made, because in the latter instruction the allegations of the complaint are set forth, including the statutory violations, and requiring plaintiff prove either of them to be the proximate cause of the injury. Therefore, it is distinguishable from the cases cited by defendant, which do not set forth the charge in the complaint predicated upon the statute, and which do not require that plaintiff prove them to be the proximate cause of the injury.

We have examined defendant's instructions refused by the court and find no error in the refusal to give them.

We think the record is free from reversible error, and accordingly the judgment of the Superior Court is affirmed.

AFFIRMED.

TUOHY AND NIEMEYER, JJ. CONCUR.

44449

RICHARD J. COONEY, Appellant, v. JOHN A. VERHOEVEN, et al., Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint on October 25, 1945, to foreclose a junior mortgage on real estate. The mortgage was given to secure the payment of two notes, one in the principal sum of $25,875.00 and an interest note in the sum of $618.81, both notes dated October 15, 1925, and by their terms due on August 16, 1926. Amended answers were filed by defendants, setting up the Statute of Limitations, and alleging that at no time were the notes extended; that no agreement for extension of payment was recorded in the office of the Recorder of Deeds of Cook County; that no part of the principal or interest was paid within 10 years prior to the filing of the complaint; and that the action is barred by Section 11 of the Limitations Act (Chap. 83, Ill. Rev. Stat. 1947). Plaintiff replied that defendant John A. Verhoeven was a non-resident of the State for more than 10 years prior to the filing of the suit; that the trust deed secured two notes; that one was paid, and the payment of one extended plaintiff's note until after the filing of the suit; that John A. Verhoeven paid him $500.00 on May 1, 1936.

Upon the issues thus raised by the answers and reply, respecting the Statute of Limitations, the cause was referred to a master, who filed his report, finding that plaintiff's cause of action was barred by the Statute of Limitations and recommending that the complaint be dismissed for want of equity. Exceptions to the report were filed and overruled and a decree entered dismissing the complaint for want of equity.

The only question upon this appeal is whether the master's report and the decree are against the manifest weight of the evidence. We have examined the evidence and are satisfied that the master was correct in finding that there was no payment made upon the notes secured by the mortgage within 10 years prior to the filing of the complaint, nor was defendant John A. Verhoeven a non-resident within that period, nor was there any agreement to extend the payment of the notes.

We believe the evidence fully justified the decree, and it is accordingly affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

44571

MAX ROTHFIELD, Appellee, v. ST. LOUIS BATH HOUSE CORPORATION, Appellant	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this suit for personal injuries resulting from the alleged negligence of defendant, in the operation of a bath house, of which plaintiff was a patron. There was a trial by jury and a verdict for plaintiff, upon which judgment was entered, from which defendant appeals.

The evidence in this record, in our judgment, clearly establishes the following facts: that defendant owned and operated a bath house; that plaintiff for over a considerable period of time had been a regular patron of the bath house and paid a fee for taking a bath; that he was familiar with all of the facilities; that on the day in question, he went into the hot room to take a sweat bath; that the hot room had three benches on the right and left sides of the walls, the lowest of them being about 18 inches from the floor level and the others spaced a like distance from one another; that two cold water faucets were attached at each side of the benches and a combination hot and cold water faucet, so marked, was installed at the entrance of the room, about

12 inches from the floor level; that this combination faucet is clearly shown by the evidence to have been used exclusively by the attendants employed by defendant, to throw water into the oven to create and generate steam; that while plaintiff was in the hot room, he became somewhat overheated and, to cool off, went to the combination faucet and used a bucket to fill with cold water to throw over himself; that when he put his hand under the faucet he was apparently scalded by hot water coming out of the faucet, which he expected to be cold; that there was a regular shower room used by the patrons for taking a shower to cool off, and that plaintiff used it a number of times but decided on this occasion not to go to the shower room, provided for that purpose, but to substitute a bucket of cold water instead; that the shower room was specially adapted for the very purpose. It further appears that the maintenance man, employed by defendant, inspected the faucets every day; that he made the usual inspection on the day in question and found nothing wrong with the faucets or combination faucet; that another employee of defendant, a master plumber, checked all of the plumbing twice weekly, including the faucets, and repaired them whenever necessary; and that he found nothing wrong with the equipment the day before the alleged accident.

The controlling question upon this record is whether there is any evidence to establish negligence on the part of defendant. We are unwilling to interfere with the verdict of a jury and the judgment of the court thereon unless we are satisfied that the evidence for plaintiff,

taken in its most favorable light, fails wholly to establish any negligence on the part of defendant. No defective condition of the equipment is shown by this evidence. No knowledge on the part of defendant of any alleged defective equipment is shown. A shower room, made available to patrons for cooling off, if that was plaintiff's desire, was not availed of by plaintiff, but instead he used a faucet, plainly marked "cold" and "hot", not used by the patrons but by the attendants. As pointed out, plaintiff was thoroughly familiar with all of the facilities of the bath house available to patrons. He chose not to make use of them but to employ a method not shown to be inherently dangerous. Under the circumstances we can see no basis for imputing any negligence to this defendant in the operation of its bath house.

In the view we take of this record, it will be unnecessary to discuss the other questions raised by defendant.

Accordingly, the judgment of the Municipal Court is reversed.

REVERSED.

Tuohy and Niemeyer, JJ., concur.

44691

LAURA SEEHASE, Appellee, v. ROBERT M. HIRSCH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this forcible entry and detainer suit against defendant for possession of the housing accommodation occupied by defendant as a tenant, possession of which was sought for plaintiff's own use, as required by the U. S. Housing and Rent Act of 1947. The suit was brought July 14, 1948. Trial with a jury resulted in a verdict for plaintiff, upon which judgment was entered after motions for new trial and for judgment notwithstanding the verdict were overruled.

It appears from the undisputed evidence that plaintiff was a tenant under a written lease, which expired June 15, 1948. A written notice of termination of tenancy, by registered mail, was received by defendant April 10, 1948.

Defendant contends that the notice, sent by registered mail, was not a compliance with the statute, since there is no provision in the statute for notice by registered mail. The precise question was decided by us, adversely to defendant's contention, in Goroway v. Shelby, 331 Ill. App. 181.

It is urged that the evidence fails to show that

plaintiff in good faith required the premises for her own use to entitle her to maintain the action in accordance with the Federal Housing and Rent Act of 1948. We think this was within the province of the jury to determine and, having done so, we cannot say upon this record that it was against the manifest weight of the evidence.

There is no reversible error presented, and the judgment is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

43774

A

BENJAMIN N. BROWN, Trustee in Bankruptcy of the L. & M. Investment Company, a corporation of the State of Delaware, Appellee,	APPEAL FROM
UNITED STATES OF AMERICA, Intervening Petitioner-Appellee,	CIRCUIT COURT
v.	COOK COUNTY
MAX McGRAW, McGRAW ELECTRIC COMPANY, a corporation, and JUDSON LARGE, Appellants.	

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order vacating a prior order dismissing the suit on a No Progress call and redocketing it as a pending case. The matter was heard on the verified motion of plaintiff to vacate the order of dismissal and defendants' answer thereto. There is no material controversy as to the facts.

The original complaint was filed in 1937 charging defendants with conspiracy to defraud creditors and with disposition of the assets of the bankrupt corporation. A general reference was made to Master in Chancery Harold E. Sullivan on June 24, 1942; hearings were commenced before the master in October, 1942, and the case was still on reference before the master when dismissed for want of prosecution November 24, 1944. On July 3, 1944 the Executive Committee of the Circuit court directed the Clerk to prepare No Progress chancery calendars containing all chancery matters (excluding annulment of marriage,

divorce and separate maintenance suits) filed prior to September 6, 1943, which were still pending and in which no action had been taken within a year. The Clerk was further directed to include in the calendars information showing the name of the master and the date of reference where cases had been referred to a master. In the preparation of the calendars this case appeared under its regular number, with a notation "(Ref. to Master Sullivan, 6-24-42)". On Monday, November 20, 1944, notice was published in the Chicago Daily Law Bulletin to the effect that Judge Finnegan would on Friday, November 24, 1944 have a call of No Progress Chancery Calendar No. 2, on which the present case appeared, and unless a showing was made as required by the rule of the Court the cases thereon would be dismissed for want of prosecution. A similar notice was published on November 21st. On November 24th, on the call of the calendar, neither the attorneys for the plaintiff nor the attorneys for the defendant appeared, and thereupon Judge Finnegan entered the order of dismissal. Subsequent to the dismissal of the case five hearings were held before the master, in each of which defendants' counsel participated and, without objection to want of jurisdiction, offered testimony and evidence and exhibits in support of their answer; both sides rested in January 1945, since which time the master had the cause under advisement in preparation of his report. The petition to vacate the order of dismissal was not filed until March 7, 1946.

Plaintiff contends that the dismissal was due to an error of fact on the part of the trial judge, and therefore

the order could be vacated after the lapse of 30 days. Defendants insist that the court was without jurisdiction to vacate the order of dismissal more than 30 days after the entry of the order on mere motion and petition filed in the cause; that the provisions of the statute relating to a motion in the nature of a writ of error coram nobis do not apply to chancery proceedings; that defendants had not by their participation in the hearings before the master, after the order of dismissal, waived their right to assert the lack of jurisdiction of the court to vacate the order, because at the time of said participation neither the defendants nor their counsel had notice or knowledge of the prior dismissal of the cause.

It is the settled law that the provisions of section 72 of the Civil Practice Act relating to motions in the nature of a writ of error coram nobis are not applicable to chancery proceedings. Frank v. Salomon, 376 Ill. 439. Plaintiff's right to a vacation of the order of dismissal rests upon the effect of defendants' voluntary appearance and participation in subsequent hearings before the master without raising the question of loss of jurisdiction by the order of dismissal. In Steinhagen v. Trull, 320 Ill. 382, the court said:

> "The general rule is that a court has no jurisdiction to set aside, modify or change its judgment after the expiration of the term at which it was rendered, but we have held that this may be done at a subsequent term when all the parties to the suit consent to it. Humphreyville v. Culver & Co. 73 Ill. 485; Gage v. City of Chicago, 141 id. 642; Sheridan v. City of Chicago, 175 id. 421; Hansmeyer v. Indian Creek Drainage District, 284 id. 458."

In Herrington v. McCollum, 73 Ill. 476, the original bill was dismissed in 1863 for want of answer to the defendants' cross-bill and the cause was reinstated on the docket in 1865 without notice to defendants; thereafter they appeared and participated in the proceedings without objection. It was there said:

> "The court, unquestionably, had jurisdiction of the subject matter of litigation; and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance. The defendants, to avail of the right to question the jurisdiction of the court when the case was reinstated, should either have not appeared at all, or limited their appearance to the objection against the jurisdiction of the court."

Recent Appellate court cases holding that participation in proceedings without objection, after order of dismissal on the call of No Progress calendars, estops the defendant from questioning the jurisdiction of the court to vacate the prior order of dismissal, are Freise v. Mid-City Trust & Sav. Bank, 298 Ill. App. 17, Redwine v. Horrocks, 297 Ill. App. 638 (abst.) and Pieczynski v. Pieczynski, 323 Ill. App. 649 (abst.). In the latter case hearings were had before the master after the order of dismissal. The fact that at the time the defendants participated in the proceedings before the master, after the dismissal, they had no knowledge of the order dismissing the case, does not relieve them from the rule announced in the foregoing cases. If, as defendants contend, plaintiff was under obligation to take notice of the appearance of the case on the call of the No Progress calendar and bound by the orders entered,

defendants were likewise obliged to take notice of the orders entered and cannot assert lack of knowledge as to the dismissal of the case as an excuse for their subsequent appearances before the master.

The order is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44149

GRACE WEATHERHEAD, Appellee, v. WILLIAM BERTHA, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree finding him indebted to plaintiff on account of securities entrusted to defendant for investment by plaintiff's mother and for which defendant had not accounted, in the principal sum of at least $2,875, with interest from March 1, 1932, less a credit of $300. While the case was pending on reference to the master defendant filed an amended answer in which he set up that the sum of $2,875, the proceeds of securities entrusted to him, had been invested on behalf of plaintiff and her mother and had been lost in the market on the purchase and sale of securities. No replication was filed to this answer. Defendant did not testify and offered no evidence in his behalf.

On appeal defendant asserts that there is neither allegation nor proof of an express trust between defendant and plaintiff's mother; that a court of equity has no jurisdiction because the accounting between the parties is not intricate or involved; that the action is barred by the statute of limitations and that the allegations of the amended answer must be taken as true. The evidence

shows that defendant was a neighbor of plaintiff and her mother; that he received the securities of the mother for the purpose of appraising them and advising the mother as to the securities to be held and those to be disposed of; that he sold certain securities and retained the sum of $2,875 for investment on behalf of plaintiff's mother; that at various times, as late as November 1942, plaintiff asked defendant for a report on his transactions; that in response to these various requests defendant insisted that the money was secure, that plaintiff had nothing to worry about and, in response to the last request, stated, "Be patient and you will be very happy with the money I will return to you. You will never lose a cent." No accounting was ever made or any information given as to the securities, if any, in which defendant had invested this trust money.

A fiduciary relation existed between defendant and plaintiff's mother and, upon the death of the latter, between defendant and plaintiff. Beach v. Wilton, 244 Ill. 413. In investing the money entrusted to him, defendant was obligated to exercise a reasonable discretion and the utmost good faith. He was also required to render an account showing the particular investments made, the time when made and from whom the securities were purchased and the loss sustained on each. So far as the amended answer of the defendant shows, the losses incurred may have been on securities which he, as trustee, purchased from himself as an individual. There is no pretense that he ever made an accounting.

Defendant having assured plaintiff, as late as November 1942, that the fund was secure and she would be happy with the money defendant would return to her, this complaint, filed in 1944, was filed in apt time.

The decree is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44495

LEMOINE R. WATSON, Appellee,	)	338 I.A. 202
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO
MARIE KENORES, Appellant.	)	

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying her motion to vacate a consent judgment in a forcible detainer action in which the court had jurisdiction of the persons and of the subject matter. Such a judgment is, in reality, an agreement between the parties rather than a judicial adjudication. That it cannot be vacated except for fraud is so well established, the citation of authorities is unnecessary. No fraud is charged. Having considered the appeal on its merits, the motion to dismiss the appeal is denied.

The order is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44603

RICHARD T. SHEA, Appellee, v. TRAINING WITHIN INDUSTRY ASSOCIATES, INC., an Illinois Corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COUR

Defendant appeals from a judgment rendered against it in plaintiff's action for the amount due him for services rendered under an oral contract and for attorneys' fees and costs of suit. The case was tried before the court without a jury.

Plaintiff contends that he was employed at $500 per month under an oral contract entered into with the president of the defendant; that he was paid for his services through July 31, 1947, but received nothing for services rendered through August, September and October. The president of defendant testified that the services of plaintiff being unproductive, it was agreed on July 29, 1947 that thereafter plaintiff would work upon a commission basis, receiving the full retainer fees paid by clients secured through his efforts and one-third of all per diem charges for work done by him. The court found adversely to defendant and his finding cannot be set aside as against the manifest weight of the evidence. The burden was upon defendant to establish the new contract.

Defendant further objects that plaintiff's contract was void because plaintiff was a director of the corporation and there was no resolution of the board employing him and fixing his compensation. The services to be rendered by plaintiff to the corporation were distinct and different from the duties imposed upon a director as such. It therefore was not necessary that plaintiff's employment be previously authorized by the by-laws or resolution of the board. Joy v. Ditto, Inc., 356 Ill. 348. It might be added that the contract was entered into before his election as a director in May 1947, as claimed by defendant. There is no evidence that plaintiff ever acted as director.

It is further claimed that the alleged contract violates the statute of frauds in that plaintiff testified that his employment was to be permanent, and therefore it was not to be performed within a year. Plaintiff's compensation was to be paid from month to month. His suit is only for amounts due for services rendered, and therefore the statute of frauds does not apply. Warszawa v. White Eagle Brewing Co., 299 Ill. App. 509.

There was no error in the rulings of the trial court upon the testimony offered by the defendant.

The judgment is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

43797

A

B. S. HANDWORK, ANTHONY J. BLAESER, PERRY R. PENNINGTON, GEORGE B. STURTZ, and JOSYYN MFG. AND SUPPLY CO., a corporation,
Appellants,

v.

STANDARD GALVANIZING COMPANY, a corporation, FREDERICK C. BRIGHTLY, FREDERICK C. BRIGHTLY, JR., and THOMAS A. LAFTRY,
Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree sustaining a master's report dismissing the complaint for want of equity and ordering the plaintiff B. S. Handwork to assign and deliver to defendant Frederick C. Brightly a stock certificate for 467 shares of stock of the defendant Standard Galvanizing Company, a corporation.

Plaintiffs, the Joslyn Mfg. and Supply Co., a corporation, and B. S. Handwork, Anthony J. Blaeser, Perry R. Pennington, and George B. Sturtz, officers of said company, filed their complaint in equity on February 9, 1944 against Standard Galvanizing Company, a corporation, and Frederick C. Brightly, Frederick C. Brightly, Jr., and Thomas A. Laftry, officers of defendant company. Plaintiffs sought to compel the transfer of 466 shares of stock of the defendant company on its books in accordance with an assignment by B. S. Handwork to the plaintiffs of a stock certificate for 467 shares, theretofore issued by the defendant company to said Handwork, and to issue new certificates in accordance with the assignment,

including one share to himself. Plaintiffs in their complaint allege that Handwork, vice president of plaintiff company, became the registered holder of said shares of stock for and on behalf of the plaintiff company by virtue of a transaction which was in effect a purchase and sale and that upon request defendants refused to transfer the shares of stock. Defendants' answer sets forth substantially that the transaction in question was a pledge of the stock and not a sale.

By way of affirmative defense the answer alleged that Handwork agreed to loan money to the defendant company from time to time and that Handwork was to be secured for such loans by the pledge of this stock. In support of this contention defendants set forth and made a part of the pleading a written agreement (defendants' exhibit A) dated November 22, 1935. The agreement recited that the defendant company owed creditors an unspecified amount of money and was desirous of obtaining money to settle with them and also for use as working capital, and that Handwork agreed to loan the money for such purposes and to arrange settlements with the creditors. In consideration therefor the agreement contains these undertakings by defendants (paragraphs 4 and 5):

> "4. The Second Party will cause to be transferred and delivered to the First Party, or his nominees, two-thirds of the outstanding shares of the capital stock of said Corporation, being four hundred sixty-seven (467) shares.
>
> "5. In order to secure the moneys loaned by the first party to the Corporation, the second party agrees to cause the Corporation, through proper corporate action, to authorize, make and deliver to the First Party the following instruments:

"(a) Mortgage or Trust Deed covering all the land and improvements * * *.

"(b) Chattel Mortgage or Trust Indenture covering all of its tools, machinery and equipment * * *.

"(c) To execute its promissory notes to the First Party, or his nominee, from time to time for such sums as the Corporation may procure from the First Party, to be used as working capital ***."

A supplemental agreement was entered into in which Brightly would assign to Handwork a note for $16,560, made to him by the defendant company, with the understanding that the amount of the note would be immediately reduced 50%, which was the basis upon which settlement would be made with other creditors, and further provided that if on March 1, 1936 all creditors had been settled with, the remaining obligation of defendant company to Brightly on the note should be entirely cancelled.

Plaintiffs' second amended reply affirms substantially the allegations of the complaint and sets out the negotiations leading up to the making of the loan and the transfer of the stock certificate, alleging that at the time of the sale of the stock certificate, in consideration for the undertakings of Handwork as nominee for the plaintiff company, the defendant company was in desperate financial situation and on the verge of bankruptcy; that the stock had no market value; that Handwork settled with the company's creditors at fifty cents on the dollar, the Joslyn Company advancing for this purpose the sum of $6,602.07; that the Joslyn Company, through Handwork, advanced working capital in a total sum of $33,000; that Handwork took over the entire supervision of the defendant company for a number of years and the company lost money from November, 1935 until 1939, when for the first time it

began a profitable operation; that Brightly and the other officers admitted that Handwork, as nominee for Joslyn Company, is the owner of the 467 shares of stock; and said reply denies that there ever was any agreement that the shares of stock would be returned by Handwork to Brightly, and it says that the loans were subsequently repaid by the defendant company to the plaintiff company and not to Handwork individually. Defendant Frederick C. Brightly filed a counterclaim based upon the same contentions as appear in the answer, seeking a return to him, from Handwork, of the shares of stock, alleging that the terms of the pledge had all been fulfilled by defendants.

The master in chancery who heard the cause, based upon certain rulings on the pleadings, refused to permit evidence to show that Handwork acquired the stock from Brightly for and on behalf of the Joslyn Company; and refused to permit proof of dealings between the Joslyn Company and Brightly, or the Standard Company or any of its officers or employees, subsequent to the making of the contract of November 22, 1935, or proving or tending to prove that after the issuance of the stock certificate by the Standard Company to Handwork and the assignment in blank to the Joslyn Company, the Joslyn Company was the beneficial owner of the stock and that in all their dealings Brightly and the Standard Company so recognized the Joslyn Company.

Plaintiffs contend that, having established a prima facie case by the introduction of the stock certificate and request for transfer on the books of defendant company, the burden of proving the affirmative defense, namely, that the transfer was intended as a pledge and not as a sale,

was upon defendant; and that as bearing on the question of whether or not the transaction was an absolute conveyance or a pledge all conversations and dealings tending to prove the allegations of the reply should have been received in evidence.

Defendants contend that the agreement of November 22, 1935 proves that Brightly entered into an agreement with plaintiff Handwork for a loan to the Standard Company and that the stock was issued as security for such loan; that the loan having been repaid together with interest, defendants became entitled to the return of the stock, but Handwork refused to return the stock; and that under the agreement of November 22, 1935 Handwork disclaimed any interest in the stock.

The first proposition to be considered is whether or not error was committed in placing upon plaintiffs the burden of establishing that the transaction in question was not a pledge, rather than placing upon defendants the burden of proving this affirmative defense. The law presumes that a deed, absolute on its face, in the absence of proof to the contrary, is what it purports to be--an absolute conveyance. Helm v. Boyd, 124 Ill. 370; Williams v. Williams, 180 Ill. 361; Gannon v. Moles, 209 Ill. 180. We are of the opinion that the complaint in this case stated a good cause of action, that proof of the delivery of the stock certificate and possession by plaintiffs constituted prima facie ownership, and that the burden of proving the affirmative defense that the transfer of the 467 shares of stock to Handwork was a pledge and not a transfer of title rested upon the

defendants. Gannon v. Moles, supra; Rankin v. Rankin, 216 Ill. 132. Not only does the burden rest upon defendants of proving such an affirmative defense, but it has frequently been held by the courts of this State that the party who claims an absolute deed to be a mortgage must establish his claim by clear, satisfactory and convincing evidence. Council v. Bernard, 319 Ill. 392, 401; Chicago Land Bank v. O'Connor, 354 Ill. 207, 211. The above principle with reference to deeds is also applicable to stock certificates. Travers v. Leopold, 124 Ill. 431, 435; Hogg v. Eckhardt, 343 Ill. 246, 253, 258. Applying these principles to the instant case, the burden is upon the defendants to prove by clear, satisfactory and convincing evidence that the transfer and delivery of the stock certificate in question was not a transfer of title as it purports to be, but due to an agreement was meant to be merely a pledge.

It is to be considered that this is not a suit on the agreement of November 22, 1935 (defendants' exhibit A). It is a suit based on the stock certificate, and defendants' exhibit A is relied upon merely as an evidentiary fact to establish that the parties intended the transaction to be a pledge and not an absolute conveyance. Defendants' exhibit A does not of itself overcome the prima facie case made by proof of delivery of the stock certificate. The plaintiffs argue, not wholly without merit, that the agreement, far from lending credence to the defense advanced, establishes, particularly paragraphs 4 and 5 thereof, as a matter of law that the transfer of the stock certificate in question was a sale and not a pledge, and that defendants are foreclosed by their own pleadings from proceeding further. We have

carefully examined the agreement and are of the opinion that in view of the defense which is urged the defendants are not foreclosed by the use of the words "transferred and delivered" in paragraph 4 of said agreement from proving that the transfer was in effect a pledge, but that they may by proper proof support their burden that the stock transfer was upon the agreement that it would be returned upon meeting all conditions of said written agreement.

Plaintiffs' next complaint is that the master erred in refusing to permit proof to be made of transactions between Brightly and the Standard Company and its employees on the one part, and the Joslyn Company and its officers and employees on the other, as showing that Brightly intended an absolute transfer of the stock to Handwork as the agent of the Joslyn Company. If upon a retrial of this case the defendants overcome the prima facie case made by the introduction in evidence of the stock certificate and assignment, it will necessarily be upon evidence introduced by the defendants tending to establish that the transfer was a pledge rather than an absolute conveyance. In that event the plaintiffs should be allowed the fullest latitude on rebuttal in proving facts set forth in their reply showing or tending to show the nature and purpose of the transaction and the intent of the parties. All the acts and circumstances from the inception of negotiations between the parties may be shown and should have been admitted in evidence on the former trial. In a case of this kind the court is not restricted to any particular kind of evidence but may take into consideration all pertinent matters which tend to prove the

real intention and understanding of the parties as to whether this transfer was a sale or pledge.

We hold further that the burden is upon the cross-complainant in this case to prove the material allegations of his cross-complaint in order to obtain the relief prayed for. The filing of a cross-complaint is, in effect, the institution of a separate suit, and so far as practice and proceedings are concerned, there is no difference between a cross-bill and an original bill. Thomas v. Thomas, 250 Ill. 354.

For these reasons the decree of the Superior Court of Cook County is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

Feinberg, P. J., and Niemeyer, J., concur.

44125

W. M. DURHAM, Conservator of the Estate of Alice Coon, an Incompetent Person, Appellant, v. LOUISE W. COON, THE FIRST NATIONAL BANK OF CHICAGO, as Executor of the Estate of OWEN L. COON, and OWEN L. COON FOUNDATION, a not for profit corporation, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

W. M. Durham, conservator of the estate of Alice Coon, an incompetent person, filed his complaint in chancery in the nature of a bill of review on August 10, 1946 seeking to vacate a decree of divorce obtained on August 19, 1929 by the defendant Owen L. Coon from the said Alice Coon. The chancellor sustained defendant's motion to strike plaintiff's complaint and dismissed the suit for want of equity, from which decree this appeal is taken. While the matter was pending in this court, on November 30, 1948, the death of Owen L. Coon, appellee, was suggested, and Louise W. Coon, The First National Bank of Chicago, as executor of the estate of Owen L. Coon, and Owen L. Coon Foundation, a not for profit corporation, were substituted as appellees in lieu of Owen L. Coon, deceased.

The complaint alleges substantially that prior to the filing and during the period covered from the institution of this suit and continuously thereafter, Alice Wright Coon was insane; that on August 8, 1929, while said Alice Wright

Coon was under such disability, the hearing in the divorce cause was had and Owen L. Coon appearing with his attorney filed a stipulation purporting to have been entered into between the parties agreeing to a default being taken against the defendant Alice Wright Coon and that the cause be set for immediate hearing; that at the hearing which ensued Owen L. Coon testified that Alice Wright Coon had not lived with him since December, 1926, that he requested her on several occasions to return to live with him but she refused to do so, that he had never given the said Alice Wright Coon any reason for leaving him; that at this hearing Owen L. Coon called as a witness his father, James Coon, who corroborated him; that on August 19, 1929 a decree of divorce was entered; that Owen L. Coon, at the time mentioned, was a man of great wealth, which on information and belief was in excess of $20,000,000, and was a lawyer; that the divorce decree aforesaid was procured by fraud in the following particulars: that in the spring of the year 1928 Owen rented from a relative of Alice a farm home near Manteno, Illinois, and at said home the said parties lived together as husband and wife; that during this time Alice evidenced a mental derangement and by Owen's instructions was attended by several physicians; that on October 1, 1928 Owen caused Alice to be taken to the North Shore Health Resort in Winnetka, Illinois, and while she was there confined for treatment of her mental illness, Owen, on October 4, 1928, swore to and caused to be filed in the County Court of Cook County a petition alleging that Alice was

insane and that the welfare of herself or others required her commitment to a hospital or asylum for the insane, and a copy of the petition was attached to the bill, as well as a certificate of a doctor certifying to the fact that Alice was in need of mental care and treatment of an institutional nature; that while the petition was still pending and undisposed of, on October 6, 1928 Owen caused Alice to be removed from the North Shore Health Resort and be taken to the Milwaukee Sanitarium at Wauwatosa, Wisconsin, where she remained confined for treatment of her mental condition until December 22, 1928; that on the latter date Owen removed Alice from the Milwaukee Sanitarium and had her readmitted to the North Shore Health Resort where she stayed until January 3, 1929; that at all times she was under the full control of Owen; that he paid all the institutional charges for her care and treatment and all medical bills; that on January 3, 1929 he removed her to the apartment of his brother and later took her to a hotel in Evanston, and subsequently to an apartment where she was under the care of a special nurse procured by him; that he resided with her in the apartment until sometime in August, 1929; that during all the time from the inception of Alice's illness and through the month of August, 1929, she remained mentally sick and deranged and incapable of conducting her own affairs or appreciating or understanding the ordinary affairs of life; that on July 6, 1929, while Alice was in the condition aforesaid, Owen caused the bill for divorce to be filed against her; that Alice did not desert Owen as alleged in

the bill, but the parties lived as husband and wife all of the time, from December 11, 1926 to August 19, 1929 and thereafter; that she continued to be insane during all of said period; that Owen Coon had a duty to apprise the court of Alice's condition at the time of the divorce hearing, but fraudulently concealed this fact; that the stipulation for default was procured from her while she was under his absolute control and mentally incapable of entering an appearance in the cause or stipulating to any circumstances therein, or understanding anything that she was doing in that connection; that Coon swore falsely at the trial and suborned his father who testified falsely in connection with the alleged desertion; that shortly after the entry of the decree Alice, against her will and while under the influence of narcotics administered by a nurse in Coon's employ, was taken to Wichita, Kansas, and kept there in the care of her sister and a nurse; that on May 14, 1930 in a proceeding in the Probate Court of Sedgwick County, Kansas, Alice Coon was found to be a distracted person and incapable of managing her affairs; that in the year of 1933 she was returned to Illinois and on March 24, 1933, in proceedings in the County Court of Kankakee County, Illinois, she was found to be incompetent and a conservator was appointed to handle her estate; that on December 2, 1941 she filed a petition to be restored to reason, which petition was granted and on February 12, 1942, an agreement was purportedly entered into between the parties attempting to make a settlement of their property rights which had not been possible at the

time of the entry of the decree for divorce, and also attempting to ratify and confirm the legal stipulation and decree for divorce heretofore entered into; that on February 13, 1942 an order was entered in said cause based upon the purported settlement of property rights ratifying and confirming the prior proceedings in the cause and terminating all orders relating to alimony conclusively and forever; that Alice Wright Coon was then and there insane and did not have sufficient mental capacity to understand what she was doing; that on March 21, 1946 Alice Coon was again found to be an incompetent person in a proceeding in the County Court of Kankakee County, and a conservator was appointed by the court for her estate. The complaint charges that Coon, having fears as to the validity of the proceeding and the decree for divorce, fraudulently instigated the petition of December 2, 1941, wherein Alice Wright Coon purportedly sought to be restored to her reason, knowing full well that she had never regained her sanity; that he did so for the sole and only purpose of having her attempt to ratify and confirm the entire proceedings in the cause; that the contract of February 12, 1942 and the order entered in that cause are contrary to equity and conscience; that Alice, because of her insanity and mental condition, has never been able to bring to the attention of the court the facts related in the bill and that they have been gathered and presented by the conservator of her estate and that the same are presented with all due diligence after his investigation disclosing the fraud. The bill prays that the decree and proceedings be reviewed and reversed and the decree for divorce and all subsequent matters vacated; that plaintiff

be appointed guardian ad litem for Alice Wright Coon; and that leave be given to file an answer and cross-bill to the bill of complaint in the cause and for other relief.

On October 14, 1946 defendant filed a motion under Sections 45 and 48 of the Civil Practice Act of Illinois to strike the complaint and for an order dismissing the suit. As grounds defendant alleged (1) that the court does not have jurisdiction of the subject matter; (2) that the plaintiff is barred by laches and should not be permitted to maintain or prosecute his alleged cause of action because of inexcusable delay not only by the ward Alice but also by the legal representatives of the ward, and that to permit such action to be maintained at this date would be against public policy and to the prejudice of the defendant; (3) that any right of the plaintiff to seek equitable relief in the premises has been released and both the plaintiff and the ward are estopped by deed, act and record from attacking the decree of divorce; and (4) that any right to maintain or prosecute the complaint to review the original decree is barred by prior judgment. The motion was supported by the affidavit of Owen L. Coon which recited substantially that at no time prior to the entry of the decree of divorce had Alice Coon ever been adjudicated an insane or incompetent person; that the attempt to provide medical care and assistance in the year of 1928 was at the request and suggestion of her father and other relatives and that affiant had no personal knowledge of the allegations contained in the petition; that after the date of the entry of the decree Alice Coon went to live with her sister

in Kansas; that the jury which there found her to be not insane fixed the date of the first symptoms of the illness from which she was supposed to be suffering to be December 29, 1929, some 4 months after the entry of the decree of divorce here; that in 1934 Alice was adjudicated insane by the County Court of Kankakee County; that on November 26, 1935 Robert Blake, her conservator, presented a petition to the County Court of Kankakee County, Illinois, reciting the facts that Alice had been divorced by a decree entered in the Superior Court of Cook County, that Owen had made payments to the conservator of alimony due under the decree of divorce and sought permission of the court to settle and compromise delinquent alimony payments and settle all questions of alimony for the sum of $650; that an order was entered authorizing the conservator to make such settlement; that on August 1, 1940 the then conservator filed his petition in the County Court of Kankakee County in which reference was again made to the divorce decree and that said conservator was authorized to execute a partial satisfaction of the alimony decree; that in October, 1941, Alice, having improved in health, filed a petition for habeas corpus in the Circuit Court of Kankakee County, Illinois, and a hearing was had in which Alice was represented by an attorney and she was found to be a sane person on October 18, 1941; that subsequent to her restoration Alice employed an attorney to represent her in an effort to have the affiant make additional provisions for her under and by reason of the divorce decree; that thereafter an agreement was entered into between affiant and

Alice Coon providing for the payment of $10,000 in cash and $350 a month alimony, provisions for a residence, and $4,500 attorney's fees to her counsel, Lawrence C. Mills; that on February 13, 1942 an order was entered by the Superior Court of Cook County amending the portion of the divorce decree relating to alimony and ratifying all provisions of the original decree except the provision for alimony; that Alice Coon was under no legal disability at the date of the entry of the decree of divorce until May 14, 1930, from March 14, 1932 until July 24, 1934, and from December 2, 1941 until March 21, 1946; that during all these seven years Alice knew the true facts and circumstances pertaining to the decree of divorce and recognized the validity of the decree, accepted payment of alimony and consented to and prompted certain changes and amendments to the decree which pertained to alimony; that affiant relied upon the validity of the divorce decree in 1929, and on March 22, 1930 remarried, is now living with his wife and has a son 14 years of age; that no facts or circumstances pertaining to the divorce proceedings were ever concealed.

Plaintiff's theory of this case is that the sworn allegations in the bill of complaint, together with the affidavit filed by defendant in support of his motion to strike the complaint and to dismiss the suit, presented an issue of the jurisdiction of the court over the person of Alice Wright Coon by virtue of her alleged insanity and mental incompetence at the time of, prior to, and subsequent to, the entry of the decree of divorce in 1929; and that plaintiff was entitled to proceed to the trial of the issues of the insanity and mental incompetence of Alice Wright Coon under the allegations of the bill of complaint.

Defendant's theory is that the affidavit filed by the defendant in support of his motion to strike the complaint and to dismiss the suit (quoting from his brief), "sustained defendant's defense since no issues of fact were raised by plaintiff as could have been done by counter-affidavits or other proof; that under the Practice Act the Court was required to find the facts to be as stated in defendant's affidavit, on the basis of which the Court found the equities to be with the defendant; that such determination of fact and decision as to the equities in the matter are conclusive and binding and may not be reversed on appeal unless the lower court is shown to have clearly abused its discretion."

Defendant's motion to strike the complaint was brought under the provisions of Section 48 of the Practice Act (Ill. Rev. Stat. 1947, chap. 110, par. 172), the pertinent part providing as follows:

> "Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the said following defects exist but do not appear upon the face of the complaint:
>
> "* * *
>
> "(b) That the court has not jurisdiction of the subject matter of the action or suit, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
>
> "* * *
>
> "(e) That the cause of action is barred by a prior judgment.
>
> "(f) That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon.

"(g) That the claim or demand set forth in the plaintiff's pleading has been released.

"* * *

"(3) If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury."

This appeal presents a question as to whether the plaintiff's complaint, considered together with the affidavit and exhibits filed by the defendant in support of his motion to strike, is sufficient to require an answer. Defendant urges that the facts stated in an affidavit filed in support of a motion under Section 48 are to be taken as true and no allegations of the complaint in contradiction thereof may be considered by the court in ruling on the motion. With this contention we do not agree. Section 48 of the Practice Act permits the filing of a motion to dismiss, supported by an affidavit, for certain causes not appearing on the face of the pleading and enumerated by the statute. It also provides for the filing of counter affidavits by the plaintiff. The purpose of this section was apparently to obtain a summary disposition of issues of law or easily determined issues of fact. It is in the nature of a summary judgment procedure. However, it was never intended that it should be availed of for the purpose of dismissing without trial by jury or the court of complicated and involved questions of fact such as are presented by the complaint and the affidavit in support of the motion to strike filed in the instant case. In Hansen

v. Raleigh, 391 Ill. 536, the court said at page 549: "The obvious purpose of section 48 is to obtain a speedy disposition of issues of law or of readily provable issues of fact, with a reservation of jury trial upon disputed fact questions."

The defendant in this case contends that, where the complaint under oath contains allegations which the defendant denies in his affidavit supporting the motion to dismiss, in order to raise an issue of fact it is incumbent upon the plaintiff to deny defendant's affidavit by counter affidavit. We do not believe that it was intended to compel the filing of superfluous affidavits in order to raise an issue of fact which already appears from the sworn complaint and challenging affidavit.

The complaint in the instant case tendered the issue as to the insanity of Mrs. Alice Wright Coon. The affidavit in support of the motion to strike denied the insanity and set up certain other defenses involving questions of fact, all of which were in negation of the allegations of the complaint. Under these circumstances, we are of the opinion that there was a compliance with the statute. Defendant cites the cases of Leitch v. Hine, 393 Ill. 211, and Thomas v. Bourdes, 327 Ill. App. 197. However, a review of these cases indicates the affidavit in support of the motion to strike had presented questions of fact falling within the provisions of Section 48 which had not been negatived by the complaint in the cause. In other words, there was no issue of fact raised by virtue of the failure of the complainant to answer the matter set

forth in the affidavit. It was not held in either of those cases, as is insisted here, that where the complaint expressly tenders an issue of fact under oath the motion to strike supported by affidavit requires a repetition of the matter set forth in the complaint by way of counter affidavit in order to properly raise an issue of fact. On the contrary, in the case of Cook v. Ramsay, 322 Ill. App. 671, the court, considering a similar motion, said at page 675: "We believe that in considering the question of defendant's motion, the court had a right to consider not only the affidavit and exhibits in support thereof but also the allegations of the complaint."

Defendant argues that because the court had jurisdiction over Alice Wright Coon no attack may now be made on the validity of the decree. This argument begs the question. If Alice Coon were sane at the time the decree was entered, the court had jurisdiction and she could not now be heard to question the validity of the decree. However, the complaint alleges that she was insane at that time and that fraud was practiced upon the court. If such allegations are sustained, then the court had no jurisdiction and the 1929 decree of divorce is invalid. Bradford v. Abend, 89 Ill. 78; Clay v. Hammond, 199 Ill. 370; United Workmen, et al., v. Zuhlke, 129 Ill. 298. The court could not acquire jurisdiction of her person by an appearance or answer filed for her. Williams v. Williams, 265 Ill. 64, 76.

Defendant argues that plaintiff is barred by laches and that laches is a proper defense under Section 48 of the Practice Act. Subsection (f) of Section 48 of the Civil

Practice Act provides that defendant may file a motion to dismiss where among the defects existing but not appearing on the face of the complaint is the following: (f) that the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon. While no cases directly bearing on the point are cited by either counsel in their briefs, we are of the opinion that the words "the time limited by law for the commencement of an action or suit thereon" refer only to limitations and not to laches. The purpose of Section 48, as has been before stated, is to provide a method by which the court can summarily dispose of litigation by the establishment beyond controversy of a simple fact. Where a question of the Statute of Limitations is involved the fact is simple and lends itself incontrovertibly to exact computation in years, months, and days. Laches, on the other hand, depends upon many considerations and is characterized by many different circumstances. Each case where it is invoked presents its own particular facts which must be examined and analyzed, and the question of whether or not inequitable delay has occurred must be resolved in the light of the equitable considerations of the particular case. The examination into a defense of laches frequently involves long and extended examination of complicated situations and is entirely foreign to the simple determination involved where the Statute of Limitations is raised as a defense. It is also to be considered that Section 48 of the Practice Act specifically enumerates the defects existing but not appearing on the face of the complaint. While the Statute of Limitations is listed

as one of such defects, laches, as such, is not referred to. In Hansen v. Raleigh, supra, the court, in discussing this proposition, said at page 548:

> " * * * Section 48 of the Civil Practice Act (Ill. Rev. Stat. 1945, chap. 110, par. 172,) provides that a defendant may file a motion to dismiss an action where any of nine specified defects appear on the face of the complaint and, further, that he may file a similar motion supported by affidavits where any of these defects exist but do not appear upon the face of the complaint. These enumerated defects include those which, prior to the enactment of the Civil Practice Act, would have been presented by pleas in abatement and, in addition, other defenses such as the Statute of Limitations and the Statute of Frauds. No one of the grounds included in defendant's motion to dismiss * * * is listed in section 48. Nor is there any general language extending section 48 to other defects similar to the nine described."

We think that it would be an unwarranted extension of the statutory provisions to give Section 48 the interpretation which defendant here urges. Defendant cites the cases of Thomas v. Bourdes, supra, and Motel v. Andracki, 299 Ill. App. 166. Neither case is authority for the proposition. The first case deals with the question of the ten year Statute of Limitations and the second case involves a motion to dismiss a bill under Section 45 of the Practice Act for laches appearing on the face of the complaint, and not for defects existing but not appearing on the face of the complaint as provided for by Section 48. Nor is there any merit to the further contention of the defendant that plaintiff's cause of action is barred by the Statute of Limitations and therefore also by laches. If, as alleged in the complaint, Alice Coon were insane during all the periods there alleged, the Statute of Limitations did not operate against her, Van Buskirk v. Van Buskirk, 148 Ill. 9, and until that fact is determined

the application of the Statute of Limitations is not apparent. The fact that there were periods during the time covered by the allegations in the complaint during which Alice Coon was under no legal disability does not militate against her position if, as alleged in the complaint, she was actually insane during these periods. The fact that her reason was judicially restored during portions of this time neither brings the case within the Statute of Limitations nor is it res adjudicata of the fact of actual insanity. In the case of Emery v. Hoyt, 46 Ill. 258, where it was claimed that a note was made during a period when the maker was insane, it was contended that inasmuch as he was adjudicated sane at a sanity hearing held 25 days before the making of the note, such fact was prima facie evidence of sanity. The Supreme Court said at page 262:

> "As to the first refused instruction, if it be admitted the premise was true, the consequence would not follow as the court was desired to acknowledge. If the maker of the note was not insane on the 30th day of March, 1866, for the purposes of that inquest, it does not follow that the defendant was bound to prove he became insane after that day, for he had the right to establish, by proof, that he was insane on the 30th day of March, notwithstanding the verdict. To this inquiry in the County Court, these parties were not implicated, and it was, therefore, no such judgment as could affect them in any way. The defendant was not required to overcome this prima facie evidence, if it be such, or to pay any regard to it whatever. All that was required of him was, that he should maintain his side of the issue then pending-- nothing more. The verdict on the inquest amounted to nothing on the pending issue. It was wholly immaterial when the alleged insanity commenced; the question was, was he insane when he made the note?"

Defendant also argues that the remarriage of a party to a divorce suit, followed by birth of children of such remarriage, is a fact to be considered by the court in weighing

the equities to determine whether or not the litigant is barred by laches. The issue in this case is whether or not at the time this alleged divorce was granted Alice Coon was sane or insane. By motion to strike her pleading the defendant here seeks to prevent a trial on the merits to ascertain this fact. To urge that the subsequent marriage of the party against whom these cogent charges of fraud are alleged should operate to prevent a trial on the merits does not appeal to our standards of equity. If, on a subsequent trial of this cause, there appears to be reason, by virtue of subsequent marriage, for bringing the cause within the doctrine stated in the cases argued in defendant's brief, then will be the appropriate time to consider the equities of his position.

Other questions are raised in the briefs but we do not deem them necessary to consider in view of our conclusions on the decisive questions here discussed. We are of the opinion that the trial court erred in dismissing the bill for want of equity, and therefore the order of March 7, 1947 of the Superior Court striking the complaint and dismissing the cause is reversed and the cause is remanded with directions to overrule the motion to strike the complaint and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

FEINBERG, P.J., AND NIEMEYER, J., CONCUR.

44158

MINNIE HYDE, Appellant, v. CHARLES SAUNDERS, IRENE SAUNDERS, and CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint against defendants seeking to recover damages for personal injuries sustained while a passenger on defendant Chicago Surface Lines' streetcar by reason of the joint negligence of the defendants. During the pendency of the appeal Chicago Transit Authority, a Municipal Corporation, was substituted as one of the appellees in place of the Chicago Surface Lines. At the close of the plaintiff's case defendant Irene Saunders was dismissed out of the case at the direction of the trial court. This ruling is not questioned on appeal. At the close of the plaintiff's case the trial court also directed a verdict for the defendant Charles Saunders as to the paragraph of the complaint charging willful and wanton conduct. The Chicago Surface Lines made a motion for a directed verdict at the close of the plaintiff's case, which the court indicated he would allow, and the Surface Lines took no further part in the trial of the cause, although the motion was not actually entered nor was the instruction given until the close of all the evidence. At the close of all the evidence the trial

court granted a motion for a directed verdict on the remaining counts in the complaint as to Charles Saunders. Verdicts being returned in accordance with the directions of the court, judgments were entered thereon, and from said judgments this appeal is taken.

Plaintiff's theory of the case is that the evidence presented, with all the legitimate inferences that may be drawn therefrom, tends to prove that she was in the exercise of ordinary care for her own safety and that either Charles Saunders or Chicago Surface Lines, or both, were guilty of negligence which proximately contributed to cause plaintiff's injury, and that there was sufficient evidence to go to the jury as to whether or not Charles Saunders was guilty of willful and wanton negligence.

Defendants' theory of the case is that there was no evidence tending to prove any of the defendants guilty of the allegations of the complaint and that the plaintiff was guilty of contributory negligence as a matter of law.

The plaintiff, an employed woman 42 years of age at the time of the trial, was a passenger on defendant Chicago Surface Lines' southbound Halsted Street car about 1:30 in the afternoon of April 6, 1946, intending to alight at 45th Street. Halsted Street is a north and south street and 45th Street an . east and west street in the City of Chicago, but 45th Street, although it intersects Halsted Street, does not run west of Halsted Street. A portion of the Stock Yards, bounded by a fence, extends along the west side of Halsted Street. The regular stopping place for southbound street-cars at this intersection is the north crosswalk. Sometime

before reaching the point where Mrs. Hyde desired to alight, the streetcar being crowded, she gradually worked her way to the front until she reached the platform. About a half a block north of 45th Street she said to the motorman "I want to get off at Forty-fifth." Several men passengers were on the front platform with whom the motorman was laughing and talking. The motorman did nothing with reference to the operation of his car and when Mrs. Hyde saw that he was not going to stop she told him again that she wanted to get off. He stated that he did not hear her the first time and proceeded to stop the car, but not until its front end was at the south crosswalk of the intersection. An automobile driven by the defendant Saunders had been following this streetcar for a block "or so" before it came to 45th Street. It was straddling the west rail of the southbound streetcar tracks. Saunders testified that when the streetcar arrived at 45th Street "it seemed to me it was going to stop and I pulled up behind it and slowed down. I was going to stop with it. * * * Then the streetcar started up and I put the car in second and started to go around it. I started to pass it. Just as I got even with the front door of the car, the door opened. The car was coming to a stop. I guess it did stop. I pulled off to the right as far as I could when I saw the door open. I saw the lady come out of the door just as I went by."

Plaintiff testified that when the motorman opened the door she looked back and did not see any cars approaching. She released her hold on the handle of the streetcar and started to step down to the street and the next thing she

knew, when one foot was on the streetcar step and the other was coming to the pavement, she was in the air. Plaintiff testified that she did not see the vehicle that struck her and heard no sound of it approaching--neither a horn nor the screeching of brakes.

Saunders testified that the plaintiff must have struck the rear fender of his automobile; however, there is evidence in the record that she was struck by the left front fender of Saunders' automobile. Saunders admits that he did not sound the horn as he approached and passed the front end of the streetcar. Saunders' automobile continued on in a southerly direction after the accident until it was stopped by a police officer from 150 to 250 feet south of the standing streetcar.

We shall consider this evidence, in view of the court's ruling, first with reference to the defendant Saunders, and then as to the substituted defendant Chicago Transit Authority.

The defendant Saunders argues in his brief that there is no evidence tending to prove that the defendant was guilty of any negligence which caused the accident and therefore the trial court must direct a verdict. From a review of this evidence, we must question the sincerity of such argument. The facts in this case indicate that the defendant Saunders, having followed the streetcar for some distance, decided to pull around and pass a stopped streetcar. The mere fact that the streetcar was stopped, even though he did not see the plaintiff at the time he started around, should have been notice to him that passengers were very likely to be

discharged at that point. Kerchner v. Davis, 183 Ill. App. 600, 603. He then drove his automobile so close to the front platform of the streetcar that this woman, who was alighting therefrom, was struck and thrown into the air before she had both feet on the ground. To drive an automobile under such circumstances at 15 or 18 miles an hour so close to the place where passengers might be expected to alight, without sounding a horn or giving any warning whatsoever, seems to us clearly establishes a prima facie case of negligence and of willful and wanton negligence, both of which issues should have been submitted to the jury.

We have carefully reviewed the arguments with reference to contributory negligence and we are of the opinion that the question of plaintiff's contributory negligence, if any, was a question of fact for the jury. This defendant argues that "all reasonable minds must agree that stepping off when the automobile was 'right there' and so close that it appears that she stepped into the side of the auto rather than being struck by it, clearly shows a complete lack of care for her own safety." There is evidence in this record that the plaintiff was struck by the front part of the automobile, and it requires no citation of authorities that on a motion for a directed verdict the evidence favorable to the plaintiff must be taken as true, and all reasonable inferences must be resolved in her favor. Molloy v. Chicago Rapid Transit Company, 335 Ill. 164. The trial court can not weigh the evidence or pass upon the credibility of witnesses in such a state of the evidence. Read v. Friel, 327 Ill. App. 532; Molloy v. Chicago Rapid Transit Company, supra.

Inasmusch as this case must be tried again, we deem it advisable to consider the question as to whether the

court erred in sustaining defendant Saunders' objection to plaintiff's offer in evidence of a statement made by Saunders to a police officer and signed by him. Objection was made on the ground that no foundation was made for its introduction because (quoting from defendant Saunders' brief), "Before a writing or memorandum made by a witness, recording a past event is admissible, it is necessary to show, by way of foundation, that at the time it was made it was true and correct, was made at or near the time the transaction took place about which it is concerned and that at the time at which it is offered it is in the same condition as it was made and the witness has no present recollection of the matters therein contained and a reference to the document or memorandum does not awaken any present recollection of the event recorded." Defendant misapprehends the purpose of the document and the theory upon which it was offered. Plaintiff sought to introduce the document as an admission against interest, and in so far as it contains such admissions against interest, to that extent it is admissible in evidence. Brown v. Calumet River Ry. Co., 125 Ill. 600; 1 Greenleaf on Evidence, sec. 172; Morris v. Jamieson, 205 Ill. 87. Defendant urges that before the document could become competent the witnesses should be asked and their recollections exhausted orally as to the facts of the accident. If oral admissions against interest are proper, a fortiori written admissions against interest must be. It is true that a foundation may be laid by oral questions for the subsequent admission of a written document by way of impeachment, but the procedures are not mutually exclusive.

The plaintiff in this case had a right to offer the document in the first instance or at least those portions of the document containing admissions, if he so elected, for the purpose of making or assisting in making a prima facie case. Or he might have elected to have asked the defendant certain material questions and then, in the event of conflicting answers, might have confronted him with the impeaching document. The latter procedure goes to the credibility of the witness. In the former case the admission is substantive evidence of the fact sought to be established. Counsel cites a number of cases having to do with inadmissibility of hospital records and the like. Obviously these cases are not in point as such records are incompetent on the ground that they violate the hearsay rule. We are here confronted with a document which was dictated and signed by the party sought to be charged and it is clearly admissible as an admission against interest. Van Meter v. Gurney, 240 Ill. App. 165, Stump v. Dudley, 285 Ill. 46.

We come now to a consideration of error assigned on the part of the trial court in directing a verdict for the defendant Surface Lines at the close of the plaintiff's case. For a decision of this question we deem it necessary to consider only one of the several errors assigned: whether or not the action of the Surface Lines in stopping its streetcar at a place other than the usual place was the proximate cause of the accident in question. It is to be observed that this case is to be decided upon the record as it existed at the close of the plaintiff's case, and that any testimony offered by the co-defendant is not to be

considered as against the defendant Chicago Transit Authority, Condon v. Schoenfeld, 214 Ill. 226. There is no reason apparent why it was more inherently hazardous to stop on the far side of the street than on the near side. The place where the car stopped was physically the same as the usual stopping place. If it was dangerous it became so by virtue of circumstances beyond control of this defendant. In St. John v. Connecticut Co., 103 Conn. 641, 131 Atl. 396, a judgment of non suit was affirmed in a case where the streetcar stopped short of a pole which was painted white to indicate a stopping place for trolley cars. The plaintiff alighted and was struck by an automobile. The court said (pp. 397, 398):

> "There was no duty on the part of the company to have its cars stop at the white-marked pole; it might stop at any convenient place in the vicinity, provided exit was afforded upon a highway not defective or dangerous."

In Carter v. Spokane United Railways, 157 Wash. 166, 288 Pac. 247, the motorman, disregarding the plaintiff's signal, failed to stop the car until it had passed some thirteen feet beyond the stopping place. The motorman opened the door and as the plaintiff stepped out he was struck by an automobile. In that case an ordinance provided for a near side stop for streetcars. Judgment at the close of the plaintiff's case was entered and in affirming the judgment the court said (page 248):

> "The controlling question is whether the respondent was guilty of negligence in opening the door for the appellant to alight thirteen

> feet north of the crosswalk and in the intersection. * * * Whether the respondent was guilty of negligence in discharging the appellant as a passenger thirteen feet north of the crosswalk depends upon whether there was at the place where he alighted some particular inherent danger calling for special care on the part of the operator of the street car."

It was held that there was no such danger.

In MacLearn v. Iowa Southern Utilities Co., 212 Iowa 555, 234 N. W. 851, the court said (page 854):

> "So far as street traffic moving north on Court street was concerned, the stopping of the street car at the center of the intersection did not in a legal sense present any greater peril than a stop at the south line of the intersection would have presented."

We are of the opinion that inherently the situation which existed at the place where the streetcar stopped was no more dangerous than the usual stopping place.

While the cases of proximate cause are not uniform and the application of the doctrine depends pretty much upon the facts of each of the cases, the facts in the case of Kahlfeldt v. Busby, 272 Ill. App. 469, are very closely analogous to those in the instant case. There the plaintiff indicated to the motorman that he wished to alight at a specified street. The car failed to stop at the near side of the crossing as provided by an order of the Public Utilities Commission, but some distance beyond the motorman opened the door and plaintiff stepped off and after proceeding a few steps toward the curb was struck by an automobile which was proceeding in the same direction as the streetcar. In affirming the judgment entered on a directed verdict, the court said (pp. 472, 473):

"*** In the instant case plaintiff was not injured by the failure of the street car to stop on the east side of the street. After the car had passed the stopping place on the east side of the street plaintiff was still a passenger upon it and in perfect safety. Had he remained on the car until it reached the next stopping place and then been injured by an automobile after he alighted, at that place, it surely could not be reasonably said that the failure to stop on the east side of Springfield was the proximate cause of the injury. As contended by defendants, 'the failure to stop on the east side of the street was merely an incident in a chain of incidents which helped to create the conditions which made the injury possible,' but it was not the proximate cause of the injury. As stated in Illinois Central R. Co. v. Oswald, 338 Ill. 270, 274: 'One act may furnish the occasion for another act, and such second act may be the cause of an injury without the first act in any manner being a contributing cause of such injury. The second act may be the result of some intervening cause in no manner flowing from the original act but which cause is given an opportunity to operate through the occasion furnished by such original act. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act.' In the instant case the motorman could have opened the door or not, as he saw fit, regardless of the fact that the car did not stop on the east side of the street, and plaintiff was not caused to step off the moving car, when he did, merely because of the failure of the motorman to stop on the east side of the street."

Numerous cases are cited by plaintiff, an analysis of each of which would unduly prolong this opinion. We believe that they are distinguishable either on the grounds that they involved situations where the instrumentality which caused the injury was under the control of the defendant company or defective premises and platforms or involved depots where all the instrumentalities were under control of defendants, rather than public streets. The case upon which greatest reliance seems to be placed by plaintiff is that of Paris v. East St. Louis Railway Co.,

275 Ill. App. 241. In that case the driver of defendant company's motorbus discharged a passenger at night in the middle of the street about 100 feet past the regular bus stop and the passenger, unaware that it was not the usual stop, stepped into the street and was struck by an automobile. Under these circumstances the court held that it was a question of fact for the jury as to whether or not the bus driver was in the exercise of the highest degree of care and whether or not his negligence, if any, was the proximate causd of the accident. The opinion itself seems to contain the factors which distinguish it from the instant case, where the court said (page 245):

> "The cases cited by the defendant with respect to the duty of those operating street cars must be applied with reservations to the case of one operating motorbuses. The principle of law elementary to this situation requires of the carrier the highest degree of care reasonably consistent with practical operation of the carrier. Chicago City Ry. Co. v. Pural, 224 Ill. 324, 328, 329. The carrier is required to provide a reasonably safe opportunity for the passenger to alight. Griswold v. Chicago Rys. Co., 339 Ill. 94, 98. A street car cannot be operated so as to discharge passengers at the curb. A bus can be so operated and ordinarily is so operated. Such operation is not only the most practical way of preventing automobiles from driving between the bus and the curb, but it is also the effective way to warn automobile drivers that the bus is about to discharge passengers." (Italics ours.)

In view of the above considerations, the judgment of the trial court as to the defendant Chicago Transit Authority is affirmed, as to the defendant Charles Saunders is reversed and remanded.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Feinberg, P. J., and Niemeyer, J., concur.

44425

ANNA BARANOFSKI, Appellee, v. NEIL HOLLEB and HOLLEB & COMPANY, a corporation, Defendants,	APPEAL FROM CIRCUIT COURT COOK COUNTY
NEIL HOLLEB, Appellant.	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries and property damage sustained in a collision between the automobile owned and driven by her and one driven by defendant. From judgment on a jury verdict in the sum of $4,500, defendant appeals.

Defendant urges that the plaintiff was guilty of contributory negligence as a matter of law; that the verdict was excessive; that there was reversible error in an incompetent volunteer statement of plaintiff while on the witness stand; and that the giving of certain instructions constituted reversible error.

The accident took place about six-thirty o'clock in the evening of February 13, 1946, in Chicago, on the highway known as the Outer Drive, at approximately 2000 north. Plaintiff left her home at 3464 Lithuanica Avenue at about six-thirty o'clock in the evening, driving a 1937 Pontiac car, intending to go to the Augustana Hospital to visit a sick relative. It was snowing at the time and the streets were partly covered with ice. After having

proceeded to the point indicated, which was in the vicinity of the hospital, she decided to turn around and go back home on account of weather conditions. She testified she could not see the street signs, that she had not driven nights, and that she was not familiar with the Outer Drive. The Outer Drive at this point is an eight lane highway, four lanes for northbound and four lanes for southbound traffic. The north and south traffic lanes are separated by an elevator dividing fin approximately a foot high and a foot and a half wide which was up, thereby separating the north and south bound traffic lanes, at the time of the accident. After turning around and heading back south, her car started to sputter and continued to do so for about a block, and then stopped on the highway. She was unable to get the car started again. Defendant's car, approaching from the rear, collided with the left rear of the parked car just as plaintiff was getting out of the car, with her foot on the running board, causing her to be thrown to the pavement.

Defendant testified that he was driving at about 20 miles an hour; that there was traffic to his right but none to his left; that it was snowing hard; that the streets were icy; that he did not see plaintiff's car until he was within about 30 feet of it; that he then applied his brakes, turned the wheels to the left in order to pass it, but his car did not react to the brakes nor to the turn.

The only other occurrence witness was Mrs. Charlotte Hacken who testified that she and her husband drove up from the north after the accident; that plaintiff's car was standing in the extreme left traffic lane; that they saw the plaintiff there, picked her up and put her in their car and took her to the hospital.

Plaintiff testified that her car, before it was struck, was directly under a lighted street lamp; that she saw the lights of the defendant's car approaching her for about a block back; and that she would estimate the speed of the car to be 35 or 40 miles an hour.

Defendant argues that there was no evidence of the exercise of ordinary care on her part, but that the above facts, particularly that she was not used to driving at night, never drove on the Outer Drive, and in disregard of unfavorable weather conditions undertook the trip through the most congested part of the city, show a reckless disregard for her own safety under the circumstances; that she should have kept to the right and driven in the outer lane where the slower moving traffic would be expected; and that when her car started sputtering she should have made an effort to get the car to the right curb. Defendant also argues that there is an inference from the occurrence that the stopping of plaintiff's car was not due to mechanical failure, but to the fact that she had permitted the car to exhaust its gasoline supply.

We consider these arguments of defendant to be without substance. We are certainly unable to say as a matter of law that it is contributory negligence for an inexperienced driver to go upon the streets in stormy weather under all the circumstances here present. We find no evidence to support the argument that plaintiff's car had run out of gasoline or that she was required as a matter of law to pull to the right of the highway at the time that her car first began to sputter. We believe these were all

questions of fact for the jury and that the finding of the jury, under all the facts and circumstances of this case, was not against the manifest weight of the evidence.

The defendant complains that plaintiff testified that she was married and resided with her husband and had two children, claiming that this evidence was irrelevant and prejudicial. Without passing on the question as to whether or not the testimony would have been subject to objection, the fact is that no objection was made to the testimony at the time it was given, and consequently the defendant may not for the first time here assign error. The People v. The Cairo, Vincennes and Chicago Railway Co., 256 Ill. 286; Graham v. The Mattoon City Railway Co., 234 Ill. 483.

Complaint is made as to a further answer made on cross-examination. Plaintiff was being interrogated about whether or not her child was home alone at the time of the accident. She replied that the child was not alone, that her husband was there. Then this question was asked: "You do your own housework now, don't you?" Answer: "My husband helps me out now. He is not working at present." There was an objection made to the answer which was stricken, and the jury were instructed to disregard it. Before the testimony was resumed, a motion was made to withdraw a juror and a mistrial declared, which motion the trial court denied. We are of the opinion that there was no error in the ruling of the trial court. We are not unaware that adroit and experienced counsel sometimes indulge in subterfuge to bring before the jury incompetent evidence of a prejudicial nature as was done in the case of McCarthy v. The Spring Valley Coal Co., 232 Ill. 473, cited by counsel in their brief. We do not believe that such is the instant case.

Here there was an inquiry made on cross-examination as to whether or not this mother had left her child alone at the time of this accident. She stated that the child was not alone, but that her husband was home in the basement fixing something. The further question, "You do your own housework now, don't you?," might well be taken by the witness as implying that if she did her own housework her husband was not home and she attempted to account for the fact that he was at home by staing that he was unemployed. We think that even if there had been anything improper in the answer which was made, it was cured by the court's ruling to strike and an instruction to the jury to disregard.

Claim is made of the fact that this verdict in the sum of $4,500 was excessive. The medical proof indicates that on the day following the accident the right hand and arm were swollen for about five or six inches above the wrist; that the x-ray showed no fracture but that the diagnosis was that the pain and inability to move the wrist were due to tearing of the ligaments; that a cast was placed on the wrist to immobilize it, extending from about three inches above the fingertips to the elbow joint, which remained on the arm for four weeks; that upon the removal of the cast the patient complained of stiffness of the wrist and pain which was accompanied by discoloration; that the pain continued for some time after the accident; that there was a lack of total function; that she could not flex and extend to the normal amount; that she was treated about 30 times all together; that the treatments consisted of diathermy and soaking; that this condition continued from the time of

the accident until the date of the trial, some 20 months later; that there was pain and inability to hold objects; that at the time of the trial there was still an impairment of use; and that there is a permanent loss of use and function of about five per cent. We are unable to say, in view of this medical testimony, that $4,500, even though high, is so grossly excessive that it was error on the part of the trial court to refuse to set it aside or that the amount of the verdict shows that it was the result of sympathy, prejudice, caprice, or some other improper consideration.

Complaint is made of the giving of five instructions in behalf of plaintiff. It would unduly extend this opinion to state and examine the specific objections made to each. The instructions objected to for the most part were stock instructions, and we are of the opinion that from an examination of all the instructions, the jury were fairly instructed as to the law.

For the foregoing reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44513

ESTHER A. BRYK, Appellant, v. JOHN A. BRYK, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree of the Superior Court of Cook County dismissing her bill for divorce for want of equity pursuant to a jury verdict of not guilty. The bill, originally for separate maintenance, was filed August 9, 1945, was amended, and the prayer for separate maintenance changed to a prayer for divorce on November 30, 1945. The bill charges extreme and repeated cruelty, setting forth acts occurring in July of 1931, August of 1944, and September of 1945. The answer denies the acts of cruelty and also pleads condonation. A cross-bill was filed but later withdrawn, so that the issues raised by the cross-bill and answers are not now before us.

The three acts of cruelty were testified to by the plaintiff with some corroboration from two of her children. The defendant specifically denies the acts of cruelty, the last of which is alleged to have occurred at the home of his mother where he was living in September of 1945. He is corroborated in certain respects by other witnesses. There is testimony on both sides bearing upon the issue of condonation. A detailed review of the highly criminatory and

recriminatory evidence would serve no purpose.

The case has been tried twice. The first trial, which was decided by the chancellor in favor of the defendant, was reversed here for failure to admit certain conversations in evidence. This second trial before a jury has again resulted in a finding for the defendant on the issues involved. We find no substantial error in the admission or rejection of evidence or the instructions to the jury. We are satisfied that the verdict of this jury, both on the question of the defendant's cruelty and the acts of condonation, was not against the manifest weight of the evidence. The decree of the Superior Court of Cook County dismissing the bill for want of equity is therefore affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44614

JOHN BOETTGER, Appellee and Cross Appellant, v. ALBERT MILLER, doing business as MILLER TRANSFER COMPANY and MILLER TRANSPORTATION, INC., a corporation, Cross Appellees, CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for injuries alleged to have been sustained while a passenger on defendant Chicago Transit Authority's eastbound streetcar as a result of a collision between said streetcar and a southbound trailer truck being driven by an employee of defendants Albert Miller, doing business as Miller Transfer Company and Miller Transportation Inc., a corporation, about midnight January 9, 1946 at the intersection of 87th and State streets in Chicago. A jury returned a verdict finding defendant Chicago Transit Authority guilty, assessing plaintiff's damages in the sum of $50,000, and finding the other defendants not guilty. The essential disputed question of fact was whether or not the streetcar was started up before the light turned green for east and west traffic. Witnesses testified on each side of the disputed fact issue. A special interrogatory, "Was the operator of the streetcar negligent?" was submitted to the jury and the answer "Yes" was returned.

Plaintiff filed motions for judgment notwithstanding the verdict and for a new trial as to the defendants Albert Miller, doing business as Miller Transfer Company and Miller Transportation Inc., a corporation, which motions were overruled. The Chicago Transit Authority filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, which was overruled. From a judgment on the verdict this appeal is taken by the defendant Chicago Transit Authority, and a cross appeal as to the other defendants is taken by the plaintiff.

In view of what is held in this opinion, it becomes unnecessary to further consider the cross appeal, and all reference hereafter made to the defendant shall refer to the defendant Chicago Transit Authority.

Defendant contends (1) that the verdict was against the manifest weight of the evidence, and (2) that the damages awarded are excessive.

Plaintiff maintains that defendant, by failing to object in its motion for a new trial to the special finding of the jury that the operator of the streetcar was negligent, has waived any objection that the verdict was against the manifest weight of the evidence. He further contends that the verdict was not against the manifest weight of the evidence and was not excessive.

The jury, by answer to the special interrogatory, found that the operator of the streetcar involved in the accident was negligent in its operation. No question as to the correctness of the finding of this interrogatory was raised by the defendant in his motion for a new trial, nor has any error been assigned here based on any such contention. It has frequently been held by the courts of this

State that by failing to question the correctness or propriety of a jury's finding on a special interrogatory the aggrieved party is conclusively bound by the finding. Voigt v. Anglo-American Provision Co., 202 Ill. 462; Szalacha, Administrator, etc. v. Landsman, 325 Ill. App. 691; Rubottom v. Crane Company, 302 Ill. App. 58.

Counsel for defendant urge that because in their motion for a new trial it was contended that the evidence failed to show negligence on the part of any of its agents or employees, it became superfluous to raise the question as to the correctness of the special verdict. While the rule in the above cases, especially Voigt v. Anglo-American Provision Co., would seem to hold to the contrary, we have nevertheless carefully reviewed the evidence and are unable to say that the finding of the jury on either the general or special verdict is against the manifest weight of the evidence.

With reference to the error assigned that damages awarded are excessive, we have for consideration the following facts: The plaintiff was 51 years of age at the time of the accident, was married, and was in good health prior to the accident. He had been steadily employed up until the time of the accident as a tool maker and his annual earnings were in excess of $4,000. His work attendance record was very high for a number of years prior to the accident, including considerable overtime work. His loss of wages from the date of the accident to the date of the trial amounted to approximately $8,000, and up to the time of the denial of the motion for a new trial to approximately $10,000. The evidence shows that immediately after the accident plaintiff was taken to St. George Hospital, was unconscious and was bleeding from his ears and nose; that

his teeth were knocked out in front; that he had a deep gash on the left side of his forehead; that he was unable to close his left eye and was suffering severe pain; that he was in the hospital for 26 days during which time he suffered from headaches, dizziness, lack of control of his eye, nausea and bleeding from the nose and ears; that he left the hospital in a wheelchair and was carried home where he remained in bed for 2 or 3 months; that he was not able to leave the house for 5 or 6 months; that he had seen a doctor up until the date of the trial about once or twice a month; that X-rays showed a skull fracture about 3 inches long extending downward into the mastoid bone and into the base of the skull; that the bleeding came from the head at a place where the spinal cord comes out; that the skull fracture was through the inner and outer tables of the skull; and that fractures of the kind suffered are characterized by a tearing of the covering of the brain, followed by scar tissue. The plaintiff attempted to return to work about a year after his accident, worked 3 days and was unable to continue. He suffered from "blackouts," headaches, dizziness and nausea, and at the time of the trial he was not working. Dr. J. T. Meyer, the attending physician, stated that plaintiff's condition was permanent and that he could never return to any gainful occupation. Dr. Sherman Shapiro, a neurologist, testified that plaintiff was suffering from a vertical nystagmus (which is an involuntary up and down movement of the eyeball); that there were indications of damage to that part of the brain which is connected to the vertical pathways to the internal ear; and that in his opinion the plaintiff suffered a severe brain injury in addition to the basal skull fracture which is indicated from the severe concussion and bleeding

from the ear. He further stated that he believed this brain damage to be permanent.

As against the testimony of these doctors, defendant introduced the testimony of Dr. Sidney S. Greenspahn who testified as an expert, not having examined or treated the plaintiff. Dr. Greenspahn's testimony, based upon a hypothetical question, was that from the symptoms the man was not unconscious; that he had no lesion of the brain; and that the symptoms are all consistent with a temporary injury.

We conclude that if this man whose loss of earnings at the time of the judgment amounted to $10,000 has been permanently disabled from any substantial occupational pursuits and if he suffered the injuries testified to by plaintiff's doctor, then the amount of damages awarded, while high, is not excessive. Whether or not he suffered these injuries and damages was, under all the facts and circumstances, a question for the jury. We are unable to say that their finding in this respect was against the manifest weight of the evidence. Inasmuch as the plaintiff, in view of this holding, has waived cross appeal, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Feinberg, P.J., concurs.

Niemeyer, J., specially concurring:

I concur in the result but believe that the objection to the finding on the special interrogatory was sufficiently preserved by the motion for a new trial. Walz v. Chicago, M. & St. P. Ry. Co., 232 Ill. App. 398.

44682

WILLIAM SCHULTZ and ELIZABETH C. SCHULTZ, Appellees,	)	APPEAL FROM
v.	)	CIRCUIT COURT
GUSTAV FALK, et al., Appellants.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

William Schultz and Elizabeth Schultz, his wife, filed a complaint in chancery in the Circuit Court of Cook County against Gustav Falk and Mary Falk, his wife, for specific performance of a contract under which the defendants agreed to sell certain real estate for the sum of $12,000. The defendants filed an answer. The cause was referred to a master in chancery, with directions to take proofs and report his conclusions. He recommended that the complaint be dismissed for want of equity. Objections filed by plaintiffs to the master's report were allowed to stand as exceptions. The chancellor entered a decree directing specific performance of the contract. Prior to the entry of the decree, William Schultz died, and Elizabeth Schultz, administratrix of the estate of William Schultz, deceased, was substituted. Gustav Falk and Mary Falk appealed. For convenience, we will refer to William Schultz and Elizabeth C. Schultz as the plaintiffs and Gustav Falk and Mary Falk as the defendants.

The real estate involved is commonly known as 4004 North Hermitage Avenue, Chicago, improved with a two story

building. Defendants lived on the first floor. The second floor had been remodeled into smaller apartments, which were rented. The defendants wished to sell their property and move to California. They placed advertisements to sell the property in various publications. In February or the early part of March, 1946, a salesman employed by Mildred Burke called upon defendants and obtained a listing of the property. Mrs. Burke operated three offices, one on the northwest side under the name of Northway Realty, one on the south side under the name of Southway Realty and one in the loop, the first two being real estate brokerage offices and the latter being a loan office. Plaintiffs called at Mrs. Burke's northside office on or about March 24, 1946, and spoke about purchasing real estate. A salesman from that office then accompanied plaintiffs to defendants' home, where the premises were examined and the purchase price discussed. Defendants stated that they would sell the property for $12,000 in cash, to which plaintiffs agreed. Plaintiffs then returned to the Northway Realty office and there deposited $25 toward the purchase of the premises. A written contract at a purchase price of $12,000 was prepared by employees at the Northway Realty office and signed by plaintiffs and defendants on March 26, 1946.

The contract contained the following clauses:

"Payment of purchase price and delivery of deed shall be made at office of Northway Realty. * * * Buyer has paid Three Thousand Dollars earnest money to be applied on purchase price, and agrees to pay, within five days after title is shown good or is accepted by buyer, the further sum of $9,000, provided deed as aforesaid shall be ready for delivery. * * * This contract and earnest money shall be held in escrow by Northway Realty for the mutual benefit of parties hereto, * * *."

The $3,000 deposited was in the form of two cashier's checks, payable to the Northway Realty, one for $300 and one for $2,700. These checks were forwarded by employees of Mrs. Burke's northside office to her southside office, and were paid in due course following her endorsements thereon. Marvin D. Patterson, who was associated with Mrs. Burke from November, 1945, until her office was closed in April, 1946, was the manager of her northside office. He referred plaintiffs to A. J. de St. Aubin, who conducted a real estate and loan business at 130 North Wells Street, Chicago, for the purpose of procuring a first mortgage loan on the premises. Evidently, plaintiffs had been advised by Mrs. Burke's employees that she could obtain a loan of $9,000. However, Mr. de St. Aubin told her that he could secure a loan for only $8,000. Plaintiffs agreed to the terms of the loan and a trust deed and notes were executed by them and recorded. Plaintiffs also procured and deposited, without the knowledge of defendants, an additional $1,000 with Mrs. Burke's northside office. In this transaction a cashier's check for $1,150, in favor of Mrs. Schultz, was endorsed by her and Mr. Patterson at a currency exchange, and $1,000 of the proceeds deposited with Mrs. Burke. Mrs. Burke was taken into custody and charged with embezzlement of large sums of money which she had received from prospective purchasers of real estate. The Northway Realty office was closed by the authorities. Subsequently, Mrs. Burke was convicted of a criminal charge arising out of the embezzlements and sentenced to the State Penitentiary. The master found that "the $4,000.00 deposited

by the Schultzes with the Northway Realty Company has never been returned by the Northway Realty Company or accounted for by anyone and no doubt it is included in the funds embezzled by Mildred Burke."

The decree finds that the allegations of the complaint "are true"; that the exceptions filed by plaintiffs to the master's report are well founded in law and in fact; that plaintiffs are entitled to specific performance; that the findings of fact as to the rights of the parties found by the master and set forth in paragraphs 1 to 22 of his report are substantially true and correct; that the deposit of $3,000 as earnest money was to be held in escrow by Mrs. Burke for the mutual benefit of the parties; that the $3,000 was held by Mrs. Burke for the mutual benefit of plaintiffs as contract purchasers and defendants as contract sellers; that the additional amount of $1,000 deposited by plaintiffs was at the sole risk and for the sole benefit of plaintiffs; that plaintiffs, for the purpose of performing the contract, negotiated a loan of $8,000 and executed a trust deed and note, dated April 4, 1946, which trust deed was recorded on April 15, 1946; that the plaintiffs were thereupon ready, willing and able to consummate the transaction and so notified the defendants; that the latter failed and refused to consummate the transaction, but plaintiffs were at all times and are now ready, willing and able to consummate the transaction; that in equity and good conscience the loss of the $3,000 earnest money should be borne by both parties equally; and that the sum of $1,500 should be credited to plaintiffs

in the consummation of the real estate sale.

Defendants, urging that the decree be reversed, state that plaintiffs were required to show that they were ready, willing and able to perform the contract, and that the evidence discloses that no tender of performance was or could be made by them. Plaintiffs assert that the contract did not require them to tender cash to defendants in advance of the closing conference, or in advance of a tender of deed; that plaintiffs were ready, able and willing to consummate the transaction; and that where a prospective purchaser makes a bona fide effort to comply with the terms of a real estate contract and fails to do so only because the prospective seller refuses to perform, then the purchaser is entitled to specific performance, even though he has not physically tendered the purchase money, and even though the purchase money to be used is available only through a mortgage commitment.

Mrs. Schultz testified that she brought a check for $1,150 to Mr. Patterson at the Northway Realty office, which was cashed at a currency exchange; that a few days later she talked to Mrs. Burke in her office on the south side; that she asked Mrs. Burke for a copy of her contract; that the girl in the office typed a copy from the original; that after giving witness the copy, Mrs. Burke told her to go "to the Falks" and tell them to come in and close the deal; that witness and her husband went to defendants' house and told Mrs. Falk that "we were ready to close the deal and that I wanted her to make a date with us to see Mrs. Burke"; that Mrs. Falk did not answer; that her daughter said they were not selling the property as

their deal had fallen through in California; that witness replied: "We would have to sue for specific performance"; that she (the daughter) said: "Go ahead"; and that witness has not been at the premises since. Witness recalled that the conversation with Mrs. Burke and later on the same day with Mrs. Falk and her daughter occurred at the latter's home about April 20, 1946, at about 2:30 P.M. Witness stated that she "never offered any money to Mr. and Mrs. Falk.". Defendants denied that they had any such conversation with Mrs. Schultz and denied that any deal they had in California fell through. They were considering purchasing property in California. The testimony of defendants is to the effect that plaintiffs came to their home and showed them newspaper clippings relative to the difficulty of Mrs. Burke and that the defendants endeavored to console the plaintiffs. There was testimony that the son of plaintiffs and the daughter of defendants were, severally, present on occasions, but neither of these testified.

The check for $1,150 which Mrs. Schultz brought to Mr. Patterson is dated April 12, 1946. Mrs. Schultz said she talked to Mrs. Burke "a few days later." The trust deed was recorded April 15, 1946. Mr. de St. Aubin, called by plaintiffs, testified that he had a conversation with defendants at their home about April 1, 1946; that Mrs. Falk "loaned" him the warranty deed by which defendants acquired title so that he could obtain the correct legal description of the property; that Mrs. Falk then asked him how long "this was going to take"; that he replied that the mortgage could be "written up" in about two weeks; and that "we would be able to close as soon after that date as we received a later date

opinion from the Chicago Title & Trust Company." Witness testified further that about 10 or 12 days later he saw Mrs. Falk at her home and showed her the letter of opinion and stated that he was there for the purpose of "clearing the last part of the title"; that he needed an affidavit to the effect that there were no judgments against her, Mary Falk; and that the affidavit was signed by Mrs. Falk on April 27, 1946. The affidavit received in evidence shows that it was sworn to on April 27, 1946. In answer to the question: "Was the document signed on or about the date it bears?" witness answered: "On the same day it bears." Witness testified that on the same day at defendants' house, when asked by Mrs. Falk, "How long would it take to close this deal?" he said, "In a couple of days." He also testified that at the conversation with defendants on April 27, 1946, he stated that "this would clear the entire title and arrangements will be made to close the deal." From the testimony of Mr. de St. Aubin it appears that on April 27, 1946, the defendants were cooperating in an endeavor to close the deal. Certainly, they would not have acted as Mr. de St. Aubin testified they did if a week previously they had stated through their daughter that they were not selling. His testimony corroborates the testimony of defendants. It would appear that Mrs. Schultz was mistaken when she testified that she called on Mrs. Burke and at the defendants' home on April 20, 1946.

Mr. Patterson testified that Mrs. Burke's northside office was closed in April. He stated that police officers came in, locked the door, and "that was the end of it." He

stated further that they took Mrs. Burke to court and that she was in jail at the time he testified. Mrs. Schultz testified about endeavoring to locate the signed copy of the contract. She said she went to the northside office and they told her to go to the loop office, and that when she got to the loop office "the F B I men were there" and would not let her go in; that she went to see Mr. de St. Aubin; that she then went to the State's Attorney's office; and that from there she went to see the trustee in bankruptcy, who permitted her to look through the files. In these files she found an unsigned copy of the contract. The $4,000 deposited with Mrs. Burke's office and the $8,000 to be made available by Mr. de St. Aubin as the proceeds of a first mortgage would make up the $12,000 purchase price for which the defendants agreed to give a warranty deed. When the publicity concerning Mrs. Burke appeared, it became doubtful that the $4,000 on deposit with her would be available. The chancellor held that of the $3,000 first deposited, each of the parties should bear the loss of one half, but as to the additional $1,000 deposited without the knowledge of defendants, the loss should be borne by plaintiffs. Neither party argues that the chancellor was in error in so deciding as to the $4,000. Accepting the chancellor's view, it was incumbent upon plaintiffs to produce $10,500. They had $8,000 available from the contemplated first mortgage. There was no proof that plaintiffs could procure an additional $2,500. Mr. de St. Aubin, or the parties for whom he was acting, would not pay out the $8,000

until the additional sum of $2,500, or $4,000, was available. Plaintiffs state that one method by which defendants could have tested the availability of the $12,000 was to accompany the buyers to Mrs. Burke's office and there try to close the deal. Mr. de St. Aubin testified that the deal was not closed "because of the trouble with Mrs. Burke's office." The record does not show that the $2,500, or the $4,000, was available from Mrs. Burke. The evidence is to the contrary. It was incumbent upon plaintiffs to tender either the purchase money or its equivalent. There was no duty on defendants to test "the availability of the $12,000." Defendants do not contend that plaintiffs were required to bring the purchase price in cash to their home. They contend, and we agree, that it was necessary that they prove their ability to pay for the property and that in this they failed.

For the reasons stated, the decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

44730

HILMER M. HANSEN and JAMES L. PECK, doing business as HANSEN & PECK,	)	APPEAL FROM
Plaintiffs - Appellants,	)	SUPERIOR COURT
v.	)	
FRANK P. HAUN, THOMAS J. HOULIHAN and MAE R. CARNEY,	)	COOK COUNTY.
Defendants - Appellees.	)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Hilmer M. Hansen and James L. Peck, doing business as Hansen & Peck, filed a two count complaint in the Superior Court of Cook County against Frank P. Haun, Thomas J. Houlihan and Mae R. Carney, alleging that they are duly licensed real estate brokers; that certain real estate was listed with them by the owner, Frank P. Haun, under a written exclusive listing, which expired on January 31, 1945; that therein Haun agreed to pay the usual commission; that plaintiffs advertised the property, gave Mae R. Carney information relative thereto, showed it to her and got her interested in it to the extent that on February 6, 1945, she made an offer to buy for $8,500; that the offer was not accepted; that a counteroffer was made by Haun; that this counteroffer, at the time, was not accepted by Mae R. Carney; that her interest in the property was never lost; that while these negotiations were going on Haun revoked the sales agreement; that a short time later Houlihan purchased the property from Haun for $8,800, which funds were supplied by Mae R. Carney; that Houlihan took title as her nominee or trustee; that several months later Houlihan conveyed the property to Mae R. Carney; and that when Haun moved from the

premises, Mae R. Carney moved in. Plaintiff prayed for judgment for $440. A motion to dismiss by Thomas J. Houlihan and Mae R. Carney was sustained and judgment was entered in their favor. Plaintiffs appeal from the judgment in favor of Houlihan and Carney. The appellees have not appeared or filed briefs.

Plaintiffs' theory of the case is that defendants entered into an arrangement to have the property transferred from Haun to Houlihan and then to Carney for the purpose of depriving plaintiffs of their commission; that this constituted an interference with the contractual right existing between the plaintiffs and Haun; that plaintiffs have suffered a loss thereby; and that they are therefore entitled to collect damages. One count seeks to recover a real estate commission on the basis of a contract, and the other count seeks damages on the theory of tort liability.

In our opinion the court erred in sustaining the motion to dismiss the third amended complaint. Therefore, the judgment of the Superior Court of Cook County is reversed and the cause is remanded with directions to overrule the motion to dismiss the third amended complaint and for further proceedings.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

238 A

44826

EDWARD L. FOERTSCH, Appellant, v. CHARLES E. FOX, JOSEPH PEACOCK, SAMUEL W. LAWTON, ROBERT C. OSTERGREN, and EVERETT KINCAID, constituting the Board of Zoning Appeals, and Roy T. Christiansen, Commissioner of Buildings of the City of Chicago, Appellees.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

338 I.A. 208

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a certiorari proceeding under the Zoning Act (Chap. 24, Sec. 73-6) to review the action of the respondent Board dismissing an appeal from a determination of the Commissioner of Buildings disapproving plaintiff's application for a machine shop license. The writ issued and on the return the Court dismissed the petition and plaintiff has appealed. On respondent's motion the cause was transferred from this Court to the Supreme Court. That Court decided it had not jurisdiction and re-transferred the cause. Foertsch v. Fox, 402 Ill. 447.

Foertsch owns the premises located at 720 W. Shubert St. A building was erected on the rear of the lot in 1915. It has been used for various manufacturing purposes since that time. Plaintiff became lessee of the building in 1942 and operated a machine shop producing tools and dies. He became owner in 1945 and has continued the operation. In June 1946 he applied to the Board for a variation. The

application was denied. Subsequently he applied for a license to operate a machine shop in the building on the rear of the lot. The Building Commissioner refused to approve the application on September 23, 1946, because "Proposed improvement does not conform with requirements of zoning ordinance" "Machine Shop in Apartment Dist (sic) Violation Sec (8) Eight". Plaintiff appealed to the Board which dismissed the appeal on January 13, 1947, "as having been previously adjudicated". This petition followed and September 22, 1947, it was dismissed and the Board's action sustained.

In his appeal to the Board plaintiff asked that the Commissioner's order be reversed because the use of the property was lawful though non-conforming and that the Commissioner be directed to approve the license application. Sixteen property owners in the same block as plaintiff's property filed written objections to the appeal. They denied plaintiff's use of the property was a lawful non-conforming use and asserted that the issue presented by plaintiff had been determined adversely to him by the Board June 10, 1946.

No evidence was taken at the hearing before the Board. There was submitted to the Board a report of the Chief Zoning Examiner giving the zoning district embracing the property, describing the manufacturing use by plaintiff and, referring the Board to its previous ruling on the application for variation. The previous decision of the Board on the application for a variation was admitted by plaintiff's attorney during the colloquy between the Board and counsel.

In view of our conclusion given hereinafter it is unnecessary for us to consider whether there should have been evidence of the previous proceedings before the Board as a basis of the Board's decision, or whether the trial court should have taken evidence. We do not agree with plaintiff that in every case of this kind, a trial court must hear evidence nor that a hearing necessarily includes sworn testimony. The essential thing in this case is that the return of the Board to the writ of certiorari should show a legal basis for the decision of "former adjudication".

Defendants say that plaintiff does not argue in this Court his right to continue the machine shop as a non-conforming use and does not attack the correctness of the Board's decision on the question of "former adjudication." Plaintiff agrees that he does not raise the point of non-conforming use and says that question will arise upon reversal and remandment. Plaintiff also replies that he does not question the correctness "of any decision of the Zoning Board of Appeals which purports to be a prior adjudication of this action" because "there never was any prior adjudication cognizable by this court as such". Plaintiff does not expressly or directly attack the decision of "former adjudication". He persistently contends that there should have been evidence on which to base the decision. His brief states that his "sole contention is that he was not afforded a hearing". It is plain plaintiff does not concede that the Board's or the Court's decision is right. His attorney in the colloquy at the hearing and in

his brief submitted to the Board unequivocally asserted that the prior determination did not estop plaintiff. We think that implicit in plaintiff's contention is the further contention that the decision of "former adjudication" was wrong. It is our view that justice requires that we consider the implicit contention. It would serve no good purpose to overlook the determination of "former adjudication" and remand the case for taking of evidence on that issue, if we are now satisfied that the determination is wrong.

Plaintiff does not deny the statement of defendants that the Board's right to apply the doctrine of res judicata is well established. We think that the Board erred in its decision to dismiss plaintiff's appeal because of the Board's former denial of the application for variation. The Superior Court on appeal likewise erred in affirming the Board's decision. The issue in the application for variation was not the same as the issue on appeal from the ruling of the Commissioner. City of Chicago v. Krema Trucking Company, General No. 44701, Filed May 18, 1949, Illinois Appellate Court, First District. In the variation proceeding it was recognized that the machine shop use was a violation of the zoning laws and an exception to the law was sought. In the appeal from the Commissioner plaintiff's position is that the machine shop use is not a violation of the zoning law.

We need consider no other points properly before us. The judgment of the Superior Court is reversed and the cause is remanded with directions to reverse the decision of the

Board of Zoning Appeals as to "former adjudication" and to determine the appeal from the Commissioner de novo. (Fleck v. Gately, 328 Ill. App. 81) in accordance with Sec. 73-6 of the Zoning Act (Chap. 24, Sec. 73-1,..73-10).

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LEWE, J. CONCUR.

237 A

44727

KENNETH KRUSE, Appellee, v. PROGRESS INSURANCE ASSOCIATION, a corporation, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered upon the finding of the court in an action brought by the son of the named assured on an insurance policy issued by defendant for public liability and property damage.

The essential facts are stipulated. Plaintiff's father, Fred Kruse, procured from defendant a policy covering public liability and property damage on account of accident in the use and operation of his automobile. This policy provided coverage of any person using the automobile with specific permission of the assured. While using the automobile with the specific permission of his father, plaintiff was involved in an accident with Anthony J. and Catherine Geiser. Afterward suit was brought by the Geisers against the plaintiff. Before the hearing plaintiff requested defendant to defend him, which it refused to do. Thereafter plaintiff defended the suit instituted by the Geisers which resulted in a verdict and judgment against him for $212.92. The present suit seeks to recover the amount of that judgment and the additional sum of $75 as attorney's fees. Upon a hearing the trial court entered judgment in favor of plaintiff in the sum of $287.92.

It is agreed that at the time of the accident plaintiff, a resident of Melrose Park, Illinois, was about 21 years of age; and that he was operating his father's automobile without a driver's license.

The sole question presented is whether plaintiff is barred from recovery under the terms of the policy because he did not have a driver's license to operate an automobile in the State of Illinois in accordance with the motor vehicle act, ch. 95½, par. 34a.

The defense here interposed rests on the construction of the last clause (appearing here in italics) of a provision of the policy which reads:

> "q" under any of the coverages while the vehicle is being operated by any person under the age of fifteen (15) years, or by any person in violation of any State, Federal or Provincial law as to age applicable to such person or as to age applicable to the occupation of such person at the time the loss occurs, or *as to any person so operating in violation of any State, Federal or Provincial laws as to operators or chauffeurs*." (Italics ours.)

Defendant argues that the only way to give the last clause of exclusion "(q)" any meaning is to construe the words "so operating" as words of reflex reference relating back to the operations covered by the policy which under the facts and circumstances of the instant case refer to the coverage of plaintiff as a non-named insured as defined in part III and that, since plaintiff was operating his father's automobile in violation of the law of this State "as to operators and chauffeurs," he cannot recover.

Plaintiff says that the policy contains nineteen different exclusions, each complete in itself; that the provision here in controversy is concerned solely with the *age* of the person operating the vehicle, and that to construe

the clause in question to embrace licensing as well as age destroys the balance and consistency of the foregoing paragraph "(q)" by injecting a new item into a specific, complete and well-defined category.

Insurance contracts should be liberally construed in favor of the insured and where two constructions of terms of the policy equally reasonable can be obtained from the wording of the insurance contract, that construction will be adopted which enables the beneficiary to recover his loss. (Midwest Dairy Corp. v. Ohio Ins. Co., 356 Ill. 389.)

In support of its position defendant relies on Universal Indemnity Ins. Co. v. North Shore Delivery Co. et al., 100 F.2d 618. There the "risks not covered" included "injuries caused in whole or in part by any automobile insured hereunder while being operated * * * by any person violating regulations governing the licensing of motor vehicle operators, or when driven by any person whose right to drive has been enjoined by proper authority or whose license to drive has been suspended or revoked."

The language of the provision in that case and the clause here involved are entirely dissimilar and readily distinguishable.

In the instant case defendant could have stated by definite and specific language any exclusion from benefits that it might have intended. If there is a lack of clarity in the meaning of the clause here in question, as we think there is, the defendant alone is responsible for it.

As pointed out in Midwest Dairy Corp. v. Ohio Ins. Co., 356 Ill. 389, at page 392: "The circumstances attending the preparation of an insurance contract are different from those usually surrounding other contracts. The company prepares the contract in the absence of the insured or anyone appearing in his behalf. He has no voice in determining or directing the contents of the contract. It is within the power of the insurance company to write the contract as it desires. It selects the words that constitute the contract."

Where, as here, renouncement of defendant's liability is based upon an equivocal expression in the contract, we think the trial court was warranted in construing it most strongly against the defendant.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J., CONCUR.

No. 10361

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

May Term, A.D.1949.

Abstract 135

MARIE WILKINSON, Plaintiff-(Appellant), vs. HART'S DRIVE-IN, INC., a corporation, Defendant (Appellee).	Appeal from Circuit Court of Kane County — Honorable Charles A. O'Connor, Judge Presiding.

Bristow, J. -- Marie Wilkinson, plaintiff (appellant), brings this appeal from the Circuit Court of Kane County where she failed to prevail in her suit against the Hart's Drive-In, Inc., defendant (appellee) wherein she sought to recover damages because one of the servants of defendant corporation refused to serve her in their eating place because she was a Negro. Defendant's conduct allegedly was in violation of paragraphs 125 and 126, Chapter 38, of Illinois Revised Statutes 1947, which is the Civil Rights statute and reads as follows:

"1. All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bath rooms, restrooms, theaters, skating rinks, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, aeroplanes, street cars, boats, funeral hearses and public conveyances on land, water or air, and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead.

"2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum not less than twenty-five ($25) dollars nor more than five hundred ($500) dollars to the person

aggrieved thereby, to be recovered in any court of competent jurisdiction, in the county where said offense was committed; and shall also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed five hundred dollars ($500), or shall be imprisoned not more than one year, or both."

Mrs. Marie Wilkinson and her friend, Mrs. Bernice Christmas, on May 13, 1948, visited the Hart's Drive-In, a public restaurant, which is located on the outskirts of Aurora. As was customary when they entered the building they gave their orders and pay for the food they desired. After this, Mrs. Wilkinson and Mrs. Christmas became seated at a table and awaited the service of their food. There were other patrons in the dining room, all of whom appeared to be white.

Norbert Finney who was employed by defendant as a waiter or sandwich maker came to the plaintiff and engaged in the following conversation: "I am sorry, but we cannot serve you here; I would be glad to serve out outside." And when asked why, said: "You are colored, are you not?" And upon receiving an affirmative reply said: "We cannot serve you in the dining room but we would be glad to serve you outside."

Finney was made a party defendant to the instant suit but he did not see fit to answer or appear and testify at the trial. The trial court found defendant Finney guilty and assessed plaintiff damages in the sum of $25.00 and found appellant not guilty. Finney did not participate in this appeal.

On the trial Fred Fross testified that he and his family are the principal stockholders in the defendant corporation; that his cashier, Violet, was in charge of the business during his absence; that he had heard nothing about the episode that gave rise to this

litigation until suit was instituted against him; that Finney was simply a waiter and a sandwich maker and that he nor any other of his employees were instructed or authorized to discriminate against anyone in serving the public; that Finney continued in his employ after the present suit was instituted.

The plaintiff testified that after she was told by Finney that she could not be served inside, that she obtained a return of her money from the cashier but that the cashier was not told at that time why she was leaving the premises. Plaintiff further testified that there were no signs appearing anywhere which indicated any discrimination against anyone on the part of the management.

It is contended by appellee and the trial court apparently concurred in this view that the wrongdoing of Finney was beyond the scope of his employment and that therefore appellee as principal should not be called upon to respond in damages.

If an agent commits a wrong in excess of his authority, the principal is not liable even though the wrong was committed for the benefit of the principal. In the case of Nelson v. Stutz Chicago Factory Branch, Inc., 341 Ill. 387, the Supreme Court said:

> "The rule is well established that the owner of an automobile is not liable for damages caused by its negligent operation by an employee whose possession of the vehicle is without the owner's permission. The relation of master and servant must exist to make the owner liable, and the servant must be acting at the time within the scope of his employment. * * *
>
> "From the undisputed evidence, Smith was not only without authority to take the automobile, but was absolutely prohibited to do so without obtaining special permission. The master has the right to conduct his business in his own way according to his own rules. His employees have noright to undertake to conduct his business for him in disregard of his rules, even though they believe it is to his interest for them to do so. Smith was at no time within the scope of his employment from the time he took the car. He was a wrongdoer throughout his possession of the car."

The evidence is undisputed that appellant had given none of his employees any authority to discriminate against any race in the conduct of his business. Finney did something that he was not employed to do and contrary to his employer's instructions. Violet, the cashier, was in charge of the business at the time of the incident under consideration. It was not she who told plaintiff she was not wanted. If it had been the policy of the defendant corporation to refuse service to colored persons she would not have taken her order and money. Finney had no right or authority to undertake to conduct defendant's business in any manner different from the standard prescribed by Mr. Frose, the owner.

Another case that is deserving of attention in this connection is that of Chesley v. Woods Motor Vehicle Company, 147 Ill. App. 588, wherein the plaintiff, a traveling salesman, had been in the habit of leaving his sample cases with the porter at the garage where he stored his car. The cases disappeared and plaintiff sought damages from the garage owner. The court, in considering the question as to whether the porter was acting within the scope of his employment, said:

> "The record discloses no evidence amounting to the dignity of proof that the porter, at the times when he received plaintiff's sample case, was acting within the scope of his employment; nor does it appear that defendant, or any of its office force, had any knowledge relating to the custody of the sample case or of its existence, until after its loss and the complaint subsequently made in consequence of such loss. Thus defendant was in the dark in relation to plaintiff's sample case and its loss until it had not only moved its place of business, but had dispensed with the services of the porter to whom plaintiff entrusted it. For aught that appears to the contrary, the porter has it yet. With the porter plaintiff left his sample case; to him he must look for its return. The evidence does not even cast upon defendant the duty of a voluntary bailee or any other legal responsibility in relation to the sample case of plaintiff. Nor does plaintiff contend that any liability is fastened upon defendant from any direct evidence, but argues that liability arises by implication from the facts in evidence, and that by applying to such evidence 'all such presumptions and inferences arising from it', the porter is proven to be the agent of defendant to receive the sample case of plaintiff. We are not able to follow either such logic or reasoning to the extent of holding that any inference or presumption of agency is justified upon any legal theory known to us from proof of that or like character. * * *
>
> "Plaintiff was bound to inform himself of the scope of the agency of the porter when he left his sample case with him, if he

desired to fasten upon defendant responsibility for its safe-keeping. Jackson v. Commercial Bank, 199 Ill. 151; Kuecke v. New Home Sew. M. Co., 123 Ill. App. 660.

"The burden of establishing agency rested upon plaintiff. Wiley v. First Nat'l Bk., 47 Vt. 546. This plaintiff did not prove."

Appellant also makes the contention that since Finney continued in the employ of defendant after he knew of his wrongdoing that such conduct is tantamount to ratification of his acts. No authority is cited which remotely sustains such a proposition. On the contrary in the case of Buckley v. Edgewater Beach Hotel Company, 247 Ill. App. 239, the court said:

"It is insisted, however, that the defendant hotel company acquiesced in the assault, by reason of its retention of McAlvany as a servant of the company for a period of time after the occurrence in question. It is true that a principal, while not present, may ratify the acts of his servant so as to become personally liable. In our opinion there must be some such affirmative act as would indicate an expressed intention to concur in the acts of the servant. We do not believe that the mere retention of a servant alone would be sufficient. As a matter of fact, if the servant had been discharged immediately after the cause of action accrued to the plaintiff it would be argued, and with force, that it was a recognition by the defendant of the illegality of the act of its servant, and would amount to a practical admission of liability on the part of the corporation.

"While it is alleged in the declaration that the defendant company had ratified and acquiesced in the alleged wrongful conduct of the defendant Conway, there is no proof in the record to sustain this averment. The evidence shows that Conway continued in the employ of defendant after the occurrence complained of by the plaintiff, but this fact in and of itself was not sufficient to charge the defendant with knowledge of or acquiescence in whatever wrongful acts, if any, may have been committed by him."

In view of the foregoing, we are of the opinion that the trial court's determination that appellant should be found not guilty was correct.

Judgment Affirmed.

OK, Wolfe

1323 X

Abstract

Gen. No. 10339 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1949

338 I.A. 210

MARITA S. PARKER, Administratrix of the Estate of MORRAL E. PARKER, Deceased, Plaintiff-Appellant, vs PEORIA TRANSPORTATION COMPANY, a Corporation and CLYDE BURNETT Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY

Dove, J.

Marita S. Parker, as Administratrix of the estate of Morral E. Parker, deceased, seeks, by this action, to recover damages for the alleged wrongful death of her son, Morral E. Parker, against Peoria Transportation Company, a corporation, and Clyde Burnett.

Morral E. Parker died as a result of a collision between a motorcycle, upon which he was riding as a guest passenger, and a bus owned and operated by the defendant, Peoria Transportation Company and driven by the defendant Clyde Burnett. The collision occurred at about 6:30 o'clock on the evening of July 31, 1947 in the City of Peoria. No question is raised

Gen. No. 10525 Agenda No. 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1949

MARITA E. PARKER, Administratrix of the Estate of MORRAL E. PARKER, Deceased, Plaintiff-Appellant, vs. PEORIA TRANSPORTATION COMPANY, a Corporation, and CLYDE TURNETT Defendants-Appellees	APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY

Cove, J.

Marita E. Parker, as Administratrix of the estate of Morral E. Parker, deceased, seeks, by this action, to recover damages for the alleged wrongful death of her son, Morral E. Parker, against Peoria Transportation Company, a corporation, and Clyde Turnett.

Morral E. Parker died as a result of a collision between a motorcycle, upon which he was riding as a guest passenger, and a bus owned and operated by the defendant, Peoria Transportation Company and driven by the defendant Clyde Turnett. The collision occurred at about 6:30 o'clock on the evening of July 31, 1947 in the City of Peoria. No question is raised

with reference to the pleadings. The issues were submitted to a jury resulting in a verdict finding the defendants not guilty. From the judgment rendered on this verdict in bar of the plaintiff's cause of action, the plaintiff appeals.

The errors relied upon for reversal are (1) that the verdict of the jury is against the manifest weight of the evidence (2) that the court erred in refusing to give certain instructions tendered by the plaintiff and erred in giving certain instructions tendered by the defendants, and (3) that counsel for defendants was guilty of improper and prejudicial conduct.

Inasmuch as the judgment must be reversed because of errors which occurred upon the trial of the cause we express no opinion as to the weight of the evidence. It is necessary however, to briefly state some of the facts. On the evening in question, Morral E. Parker, plaintiff's intestate was riding as a passenger on the "buddy saddle" of a motorcycle owned and being driven by Derrill D. Carrigan. The motorcycle was proceeding north on Franklin Street at a point approximately 100 feet south of the intersection of Franklin Street with Monroe Street and collided with the bus of the defendant corporation, which was also proceeding north on Franklin Street. As a result of the collision Parker was thrown off the motorcycle and against the pavement and the wheels of the bus, receiving injuries from which he died the following day. Franklin Street, which runs north and south, is a paved street six lanes wide. There are two northbound traffic lanes, two southbound traffic lanes and a parking lane on each side of the street. The street at the place where the collision

with reference to the pleadings. The issues were submitted to a jury resulting in a verdict finding the defendants not guilty. From the judgment rendered on this verdict in bar of the plaintiff's cause of action, the plaintiff appeals.

The errors relied upon for reversal are (1) that the verdict of the jury is against the manifest weight of the evidence (2) that the court erred in refusing to give certain instructions tendered by the plaintiff and erred in giving certain instructions tendered by the defendants, and (3) that counsel for defendants was guilty of improper and prejudicial conduct.

Inasmuch as the judgment must be reversed because of errors which occurred upon the trial of the cause we express no opinion as to the weight of the evidence. It is necessary however, to briefly state some of the facts. On the evening in question, Ernest E. Parker, plaintiff's intestate was riding as a passenger in the "body mobile" of a motorcycle owned and being driven by Darrell D. Darnell. The motorcycle was proceeding north on Franklin Street at a point approximately 100 feet south of the intersection of Franklin Street with Monroe Street and collided with the bus of the defendant corporation, which was also proceeding north on Franklin Street. As a result of the collision Parker was thrown off the motorcycle and sustained the present and the wheels of the bus, receiving injuries from which he died the following day.

Franklin Street, which runs north and south, is a paved street six lanes wide. There are two northbound traffic lanes, two southbound traffic lanes and a parking lane on each side of the street. The street at the place where the collision

occurred is in the downtown business district of Peoria. The motorcycle upon which Parker was riding entered Franklin Street from an adjacent alley on the west side of the street and about one-half block south of the point ~~xxxx~~ where the collision took place. Upon entering Franklin Street from this alley, Carrigan turned his motorcycle left, which was to the north, and was proceeding north on Franklin Street at the time of the collision.

Counsel for appellant insists that the mis-conduct of counsel for appellees in calling the defendant Clyde Burnett as a witness on behalf of defendants was improper and highly prejudicial; that the effect thereof was to place the plaintiff in an unenviable position before the jury and to convey to the jury the impression that plaintiff was trying to conceal the true story of what actually happened.

The examination of the defendant Burnett when called by defendants' counsel as a witness appears in the record as follows:

Direct Examination.

Q. What is your name?
A. Clyde Burnett.
Q. How old are you?
A. Thirty-four.
Q. Where do you work?
A. Peoria Transportation Company.
Q. Are you a driver?
A. Yes, sir.
Q. How long have you been a driver for the Peoria Transportation Company?
A. A little over thirteen years.
Mr. Knoblock: Your honor, under the law as stated in the the Evidence Act, I wish to object to the further interrogation of this witness.
The Court: So far as I can see, the objection should be sustained.
Mr. Cassidy: He is not incompetent on all matters.
The Court: I say, so far as I can see. I don't know what you have in mind.
Q. Do you know when Morral E. Parker died?

occurred in the downtown business district of Peoria. The motorcycle upon which Parker was riding entered Jackson Street from an adjacent alley on the west side of the street and about one-half block south of the point where the collision took place. Upon entering Jackson Street from this alley, Dwyer turned his motorcycle left, which was to the north, and was proceeding north on Jackson Street at the time of the collision.

Counsel for appellant insists that the cross-examination of counsel for appellee in calling the defendant Clyde Burnett as a witness on behalf of defendants was improper and highly prejudicial; that the effect thereof was to place the plaintiff in an unenviable position before the jury and to convey to the jury the impression that plaintiff was trying to conceal the true story of what actually happened.

The examination of the defendant Burnett when called by defendants' counsel as a witness appears in the record as follows:

Direct Examination.

Q. What is your name?
A. Clyde Burnett.
Q. How old are you?
A. Thirty-four.
Q. Where do you work?
A. Peoria Transportation Company.
Q. Are you a driver?
A. Yes, sir.
Q. How long have you been a driver for the Peoria Transportation Company?
A. A little over eighteen years.
Mr. Knobloch: Your honor, under the law as stated in the evidence of Mr. Levien to object to the further interrogation of this witness.
The Court: So far as I can see, the objection should be sustained.
Mr. Cassidy: He is not incompetent on all matters.
The Court: I say, so far as I can see. I don't know what you have in mind.
Q. Do you know when Morral L. Parker died?

Mr. Knoblock: I object to it; under the law as stated in the Evidence Act he is incompetent.
The Court: I will sustain the objection.
Q. What bus were you driving on August second, 1947.
Mr. Knoblock: Same objection under the law, your honor.
The Court: Objection will be sustained.
Mr. Cassidy: That is after the death.
Mr. Knoblock: It is immaterial then.
The Court: I don't see the materiality of it.
Q. Did you testify before the coroner at the inquest over Mr. Parker?
Mr. Knoblock: Same objection.
The Court: What is the objection.
Mr. Knoblock: As immaterial whether he did or not.
The Court: Objection will be sustained.
Q. You are a defendant in this case, are you?
A. Yes sir.
Q. Did you see this accident?
Mr. Knoblock: Same objection under the law, your honor.
The Court: Sustained.
Mr. Cassidy: We offer in evidence Defendants' Exhibits 7-A, 7-B, 7-C and 7-D, which is the testimony of this witness at the coroner's inquest.
Mr. Knoblock: We object to it, as under the law as stated in the Evidence Act it is incompetent and the proper foundation has not been laid, and it is immaterial and irrelevant.
The Court: Objection will be sustained.
Mr. Cassidy: That is all Mr. Burnett.
Mr. Knoblock: That is all."

In addition to calling the defendant Burnett as aforesaid, counsel for appellees also called as a witness, Betty Whetstone. The record discloses that she occupied the position of deputy coroner and stenographer for the coroner of Peoria County and as such took the testimony of the defendant Clyde Burnett at the coroner's inquest over the body of Morral E. Parker, plaintiff's intestate, and that she transcribed said testimony correctly. Counsel then offered in evidence the official transcript of defendant Burnett's testimony at the inquest as transcribed and recorded by this witness. Notwithstanding the fact the court had sustained an objection to the transcript of the testimony of this witness at the coroner's inquest when it was offered

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Mr. Knoblock: No object to it, as under the law as stated in the Evidence Act it is incompetent and the proper foundation has not been laid, and it is immaterial and irrelevant.
The Court: Objection will be sustained.
Mr. Cassidy: That is all Mr. Burnett.
Mr. Knoblock: That is all.

In addition to calling the defendant Burnett as aforesaid, counsel for appellees also called as a witness, Betty Whetstone. The record discloses that she occupied the position of deputy coroner and stenographer for the coroner of Peoria County and as such took the testimony of the defendant Clyde Burnett at the coroner's inquest over the body of Jerral V. Parker, plaintiff's intestate, and that she transcribed said testimony correctly. Counsel then offered in evidence the official transcript of defendant Burnett's testimony at the inquest as transcribed and recorded by this witness. Notwithstanding the fact the court had sustained an objection to the transcript of the testimony of this witness at the coroner's inquest when it was offered

while defendant Burnett was a witness, counsel at the conclusion of the testimony of Betty Whitstone, the deputy coroner and stenographer for the coroner, again offered to prove that the documents which he had identified as defendant's exhibits 7-A, 7-B, 7-C and 7-D were the official transcript of the testimony of defendant, Clyde Burnett, at the coroner's inquest over the body of Morral E. Parkerand were, as stated by counsel, "the actual testimony of Mr. Burnett before the coroner, about how the accident occurred and with respect to the injuries sustained by Mr. Morral E. Parker." To this offer the objection of counsel for plaintiff was sustained.

The record shows that counsel for defendant persistently pursued a clearly improper course of interrogation over the objections of opposing counsel and regardless of the adverse rulings of the court. Counsel in their argument in this court defends this conduct by asserting that defendant Burnett was not joined as a party defendant in good faith by the plaintiff but was made a party defendant for the sole purpose of making him incompetent to testify in the cause. Continuing their argument counsel say: "To lay a foundation for a consideration by the courts of such a practice as that resorted to by plaintiff, was certainly proper. All of the objections to the questions were sustained and the defendant was not permitted to testify nor was his testimony (before the coroner's jury) allowed in the case. Counsel for defendant had a perfect right to make a record on this question for presentation on review. Fortunately, in this case, the apparent schemes of plaintiff to

while defendant Burnett was a witness, counsel at the con-
clusion of the testimony of Betty Whitstone, the deputy coroner
and stenographer for the coroner, again offered to prove that
the documents which he had identified as defendant's exhibits
7-A, 7-B, 7-C and 7-D were the official transcripts of the
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how the accident occurred and with respect to the injuries sus-
tained by Mr. Morrel E. Parker." To this offer the objection
of counsel for plaintiff was sustained.

The record shows that counsel for defendant per-
sistently pursued a clearly improper course of interposition
over the objections of opposing counsel and regardless of the
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this court defend this conduct by asserting that defendant Burnett
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to testify nor was his testimony (before the coroner's jury)
allowed in the case. Counsel for defendant had a perfect right
to make a record on this question for presentation on review.
Fortunately, in this case, the argument advanced by plaintiff to

render the bus company helpless to defend, did not work and this court is not called upon to decide whether plaintiff's tactics are permissible." We are called upon, however, to examine the record and determine whether plaintiff was accorded a fair trial and that the record made in the trial court contains no reversible error.

Plaintiff had a perfect right to sue Clyde Burnett and to join him as a defendant with his employer, Peoria Transportation Company. We find no evidence in this record to sustain the charge that he was made a party defendant for the sole purpose of making him incompetent to testify. Experienced counsel for defendants well knew that Mr. Burnett was not a competent witness to the matters it was sought to prove by him and well knew that his testimony at the coroner's inquest was improper to be considered by the jury in this case. We do not know what the effect of the proceedure followed by counsel for defendants in this case had upon the jury. We are clearly of the opinion, however, that the proceedure followed necessitates a reversal of the judgment so that the issues made by the pleadings may be submitted to another jury.

In Hughes vs. Medendorp, 294 Ill. App. 424, it was held error for the court to give an instruction in a death case informing the jury that the defendant under the law could not testify on the grounds that such an instruction gave undue prominence to the absence of such testimony. Defendants' counsel accomplished the same purpose by the proceedure which he followed in this case. The asking of questions which are not relevant or proper and which are likely to cause the jury to draw unfavorable inferences against the witness or the party

render the bus company helpless to defend, did not work and this court is not called upon to decide whether plaintiff's tactics are justifiable." We are called upon, however, to examine the record and determine whether plaintiff was accorded a fair trial and that the record made in the trial court contains no reversible error.

Plaintiff had a perfect right to use dirty tactics and to join him as a defendant with his employer, Topeka Transportation Company. We find no evidence in this record to sustain the charge that he was made a party defendant for the sole purpose of making his incompetent to testify. Experienced counsel for defendants will know that Mr. Turner was not a competent witness to the accident if was sought to prove by him and will know that his testimony at the counsel's request was incompetent to be considered by the jury in this case. We do not know what the effect of the procedure followed by counsel for defendants in this case had upon the jury. We are clearly of the opinion, however, that the procedure followed necessitates a reversal of the judgment so that the issues made by the pleadings may be submitted to another jury.

In Hughes vs. Mechanics, 3d Ill. App. 464, it was held error for the court to give an instruction in a death case informing the jury that the defendant under the law could not testify on the grounds that such an instruction gave undue prominence to the absence of such testimony. Defendants' counsel accomplished the same purpose by the procedure which he followed in this case. The asking of questions which are not relevant or proper and which are likely to cause the jury to draw unfavorable inferences against the witness or the party

for whom he is testifying has been condemned on many occasions. (Atchison vs. McKinnie et al, 233 Ill. 106; Chicago and State Line Railway Co. vs. Mines et al. 221 Ill. 448; People vs. Blockberger, 354 Ill. 301; People vs. Williams 342, Ill. 197; Illinois Central Railroad Co. vs. Seitz, 111 Ill. App. 242; Chicago City Railway Co. vs. Ahler, 107 Ill. App. 397. See also annotation on this subject in 109 A.L.R. 1089 et seq.)

Plaintiff also complains of the refusal of the court to give her instruction No. 5. This instruction was a quotation of parts of the statute making the operation of vehicles of the first division beyond a certain speed prima facie evidence that they were running at a speed greater than was reasonable and proper under the circumstances. There was no error in refusing to give this instruction. (Stansfield vs. Wood, 231 Ill. App. 586; Harris vs. Piggly Wiggly Grocery Stores, Inc., 236 Ill. App. 392; Doerr vs. City of Freeport, 239 Ill. App. 560; Stitzel vs. Johnson, 331 Ill. App. 609. See also Johnson vs. Pendergast, 308 Ill. 255, for a discussion of the meaning and use of the phrase "prima facie".)

Defendants' given instruction No. 8 was as follows:

> "The court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty, but the burden is upon the plaintiff to prove that the defendants are guilty, and this rule of law as to the burden of proof is binding in law, and must govern the jury in deciding this case."

A very similar instruction was recently held improper in Alexander vs. Sullivan, 334 Ill. App. 42. That portion of the instruction which reads "and this rule of law as to the burden of proof is binding in law, and must govern the jury in deciding this case", is argumentative and unduly emphasizes

for whom he is testifying has been condemned on many occasions. (Atchison vs. McKinnie et al, 225 Ill. 108; Chicago and State Line Railway Co. vs. Hines et al. 221 Ill. 449; Ferris vs. Blockberger, 234 Ill. 201; People vs. Williams 237, Ill. 197; Illinois Central Railroad Co. vs. Reits, 111 Ill. App. 245; Chicago City Railway Co. vs. Ahler, 107 Ill. App. 397. See also annotation on this subject in 108 A.L.R. 1056 et seq.)

Plaintiff also complains of the refusal of the court to give her instruction No. 3. This instruction was a quotation of parts of the statute making the operation of vehicles of the first division beyond a certain speed prima facie evidence that they were running at a speed greater than was reasonable and proper under the circumstances. There was no error in refusing to give this instruction. (Stonefield vs. Wood, 224 Ill. App. 586; Harris vs. Fidelity Mutual Accident Group, Inc., 256 Ill. App. 399; Doerr vs. City of Freeport, 246 Ill. App. 330; Stitzel vs. Johnson, 231 Ill. App. 602. See also Johnson vs. Pendergast, 308 Ill. 295, for a discussion of the meaning and use of the phrase "prima facie".)

Defendants' given instruction No. 8 was as follows:

> "The court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty, but the burden is upon the plaintiff to prove that the defendants are guilty, and this rule of law as to the burden of proof is binding in law, and must govern the jury in deciding this case."

A very similar instruction was recently held improper in Alexander vs. Sullivan, 334 Ill. App. 42. That portion of the instruction which reads "and this rule of law as to the burden of proof is binding in law, and must govern the jury in deciding this case", is argumentative and unduly emphasizes

the rule of law which the instruction states. The quoted language is no more appropriate to this instruction than it would be if added to any other instruction in the case and if it may be added to one instruction, it may be added to all.

Defendants' instruction No. 10 told the jury that they were not necessarily bound to believe anything to be a fact because a witness has stated it to be so, provided the jury believe from the evidence that such witness is mistaken or has sworn falsely to such fact.

Defendants' instruction No. 12 told the jury "that you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances presented on the trial that such witness is mistaken in the matters testified to by said witness, or that for any other reason the testimony of said witness is untrue or unreliable." Both of these instructions are standard instructions on the credibility of witnesses. The giving of one of them rather than both would have been all that was necessary.

Defendants' given instruction No. 14 is as follows:

> "The Court instructs the jury that the law does not expect nor require of a bus company that its employees should be all the while upon guard against dangers unreasonably to be expected or against unusual or extraordinary actions on the part of operators of other vehicles. The driver of the bus in question was not required by law to exercise the highest degree of care possible to human diligence to avoid the accident, but was only required to exercise ordinary care under the circumstances. If you believe, under the evidence and the instructions of the Court that the driver of the bus in question did exercise ordinary care under the circumstances in the operation of the bus, then you should find the defendants not guilty."

There was nothing in the evidence or in the pleadings which would warrant the giving of this instruction. There is no

the rule of law under the instruction stated. The quoted language is no more appropriate to this instruction than it would be if added to any other instruction in the case and if it may be added to the instruction, it may be added to all.

Defendants' instruction No. 12 said the jury that they were not necessarily bound to believe anything to be a fact because a witness had stated it to be so, provided the jury believe from the evidence that such witness is mistaken or has spoken falsely in such fact.

Defendants' instruction No. 12 told the jury "that you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances presented in the trial that such witness is disabled in the matter testified to by said witness, or that for any other reason the testimony of said witness is untrue or unreliable." Both of these instructions are criticized in otherwise on the credibility of witnesses. The giving of one of them rather than both would have been all that was necessary.

Defendants' given instruction No. 14 is as follows:

> "The Court instructs the jury that the law does not exact nor requires of a bus company that its employees should be all the while upon guard against dangers unnecessarily to be expected or against unusual or extraordinary conditions on the part of operators of other vehicles. The driver of the bus in question was not required by law to operate the highest degree of care possible to prevent collisions to avoid the accident, but was only required to exercise ordinary care under the circumstances. If you believe, under the evidence and the instructions of the Court that the driver of the bus in question did exercise ordinary care under the circumstances in the operation of the bus, then you should find the defendants not guilty."

There was nothing in the evidence or in the pleadings which would warrant the giving of this instruction. There is no

evidence in the record which shows or tends to show any unusual or extraordinary actions on the part of the operator of the motorcycle involved in this collision but this instruction assumes there were. An instruction should not be given on issues not raised by the pleadings or by the evidence. (In re Estate of Burke, 303 Ill. App. 235; Colky vs. Metropolitan Life Insurance Co., 320 Ill. App. 120. See also Peters vs. Madigan, 262 Ill. App. 417; Elliott vs. Atchison, T. & S.F. Ry. Co., 262 Ill. App. 466; Randall Dairy Co. vs. Pevely Dairy Co., 278 Ill. App. 350).

The judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

Reversed and remanded.

evidence in the record which shows or tends to show any unusual or extraordinary action on the part of the operator of the motorcycle indicated in this petition but this instruction assumes there was. An instruction should not be given on issues not raised by the pleadings or by the evidence. (In re Estate of Wurtz, 390 Ill. App. 455; Doty vs. Metropolitan Life Insurance Co., 390 Ill. App. 120. See also Peters vs. Hallman, 389 Ill. App. 417; Illinois vs. Telephone, T. & A.T. Y. Co., 382 Ill. App. 428; Gendall. Daly vs. vs. Family Dairy Co., 378 Ill. App. 380).

The judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Abstract

Gen. No. 10342 Agenda No. 16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

338 I.A. 211

FEBRUARY TERM, A. D. 1949

WRIGHT and WAGNER DAIRY COMPANY, a Corporation Plaintiff-Appellee vs G. H. NORRIS Defendant-Appellant	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY

Dove, J.

This is an action brought by Wright and Wagner Dairy Company, a corporation, against G. H. Norris, to recover the cost of repairing the plaintiff's motor truck which was damaged in a collision with an automobile driven by said defendant.

Defendant filed an answer and counter claim to which plaintiff replied. The issues made by the pleadings were submitted to the court for determination without a jury, resulting in judgments in favor of the counter defendant and in favor of the plaintiff and against the defendant for $598,01 and the defendant appeals.

The evidence discloses that on March 14, 1947 a 1946 Chevrolet truck belonging to the plaintiff was being driven by an employee, Charley Crist, in a westerly direction on State Route 75 which is a cement slab highway. As the

Gen. No. 10342 Agenda No. 36

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1939

PATRICK and VERNON DAIRY COMPANY, a Corporation, Plaintiff-Appellee, vs. G. W. HOWLE, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY

Dove, J.

This is an action brought by plaintiff Patrick Dairy Company, a corporation, against G. W. Howle, to recover the cost of repairing the plaintiff's motor truck which was damaged in a collision with an automobile driven by said defendant.

Defendant filed an answer and counter claim to which plaintiff replied. The issues made by the pleadings were submitted to the court for determination without a jury, resulting in judgments in favor of the counter defendants and in favor of the plaintiff and against the defendant for $209.01 and the defendant appeals.

The evidence discloses that on March 14, 1947 a 1946 Chevrolet truck belonging to the plaintiff was being driven by an employee, Charley Oertel, in a westerly direction on State Route 75 which is a cement slab highway. At the

driver of the plaintiff's truck approached an intersecting township road, the defendant, Dr. Norris, a veterinarian, was driving his 1942 Dodge business coupe and was also proceeding west on Route 75 and intended to turn south. According to his testimony he failed to make the turn and had proceeded beyond the corner about 6 feet. He then stopped his car in the north traffic lane and put it in reverse and backed it for a short distance and then started forward, angling across the pavement and a portion of his car had proceeded into the south traffic lane when the truck driven by Mr. Crist endeavored to pass the Norris car resulting in the damage to plaintiff's truck for which plaintiff sues. Inasmuch as the judgment must be reversed, because there is no proof in the record of the amount of the damage plaintiff's truck sustained as a result of this collision, there is no necessity to further detail the evidence.

To prove the cost of repairs the plaintiff called as a witness, O. V. Reifenbury, who testified that he was employed as service manager by the Bud Weiser Motor Company of Beloit, Wisconsin and that he had knowledge of and was acquainted with the truck of the plaintiff that was involved in the collision on March 14, 1947. Mr. Reifenbury further testified that the plaintiff's truck was repaired in the garage where he worked and that it cost $598.01 to repair it. He was unable, however, to tell what repairs were required or the charges made therefor or whether the repair bill had been audited or whether the bill had been

driver of the plaintiff's truck approached an intersecting township road, the defendant, Dr. Morris, a veterinarian, was driving his 1942 Dodge business coupe and was also proceeding west on Route 75 and intended to turn south. According to his testimony he failed to make the turn and had proceeded beyond the corner about 6 feet. He then stopped his car in the north traffic lane and put it in reverse and backed it for a short distance and then started forward, angling across the pavement and a portion of his car had proceeded into the south traffic lane when the truck driven by Mr. Orlet endeavored to pass the Morris car resulting in the damage to plaintiff's truck for which plaintiff sues. Inasmuch as the judgment must be reversed, because there is no proof in the record of the amount of the damage plaintiff's truck sustained as a result of the collision, there is no necessity to further detail the evidence.

To prove the cost of repairs the plaintiff called as a witness, O. V. Reifenbury, who testified that he was employed as service manager by the Ball Wilson Motor Company of Beloit, Wisconsin and that he has knowledge of and was acquainted with the truck of the plaintiff that was involved in the collision on March 14, 1947. Mr. Reifenbury further testified that the plaintiff's truck was repaired in the garage where he worked and that it cost $338.01 to repair it. He was unable, however, to tell what repairs were required or the charges made therefor or whether the repair bill had been audited or whether the bill had been

paid. He further testified that he first saw the truck of the plaintiff on March 14; that the cab was crushed but he could not remember the condition of the fenders or the side of the truck which was hit. He identified a copy of a repair bill which he was shown and stated that it was an itemization of all repairs made on the truck and that the charges therein made were the usual and customary charges made by garagemen in that community for repairs and labor of a like character. He then testified: "I can't tell about whether all of these items of damages were caused on that particular day of March 14th or not." Upon this evidence appellee concedes that the trial court properly sustained an objection of appellant to the statement identified by this witness as a copy of a repair bill and in their brief counsel candidly admit that the proof in respect to the damages plaintiff sustained "is not as full as we would desire".

The only evidence before the court upon which the judgment was based, was that of Reifenbury that the repair bill, including a towing charge of $20.00 amounted to $598.01; there is no evidence in the record, however, which establishes what damages were sustained by the plaintiff's truck as a result of this accident nor is there any evidence that the repairs which Mr. Reifenbury testified to were made necessary because of this collision.

Counsel for appellee, however, cite Byalos vs. Matheson, 328 Ill. 269; Travis vs. Pierson, 43 Ill. App.

paid. He further testified that he first saw the truck of the plaintiff on March 14; that the cab was crushed but he could not remember the condition of the fenders or the side of the truck which was hit. He identified a copy of a repair bill which he was shown and stated that it was an itemization of all repairs made on the truck and that the charges therein made were the usual and customary charges made by garagemen in that community for repairs and labor of a like character. He then testified: "I can't tell about whether all of these items of damages were caused on that particular day of March 14th or not." Upon this evidence appellee concedes that the trial court properly sustained an objection of appellant to the statement identified by this witness as a copy of a repair bill and in their brief counsel candidly admits that the proof in respect to the damage plaintiff sustained "is not as full as we might desire".

The only evidence before the court upon which the judgment was based, was that of Heitenbury that the repair bill, including a towing charge of $25.00 amounted to $258.01; there is no evidence in the record, however, which establishes what damages were sustained by the plaintiff's truck as a result of this accident nor is there any evidence that the repairs which Mr. Heitenbury testified to were made necessary because of this collision.

Counsel for appellee, however, cite Taylor vs. Matheson, 328 Ill. 267; Travis vs. Hanson, 42 Ill. App.

579; Roth vs. Fleck, 242 Ill. App. 396 and Sunbeam Beverage Company vs. Cunningham, 242, Ill. App. 401. These cases hold that a paid bill for repairs made by a garage to a damaged automobile is admissible to prove the amount of damages and constitutes prima facie evidence of the reasonableness of the charge made for repairs. In the Byalos case, supra, the court stated at page 271, "If the plaintiff was entitled to a verdict he could not recover more than the reasonable cost of the necessary repairs to his car. It was proper for him to prove the amount he had paid or become liable to pay and the fact that that amount was the usual and reasonable charge for labor and material and that the repairs were such as were necessary to be made. The receipted bill was admissible to prove that the repairs had actually cost the appellee so much money." The Supreme Court in this case cited with approval Cloyes vs. Plaatje, 231 Ill. App. 183, wherein the court said at page 190, "The evidence shows that the automobile was taken to a concern which was engaged in the business of repairing of automobiles. That plaintiff's car was then repaired by the garage company in the ordinary course of business and that the repairs made were those required as a result of the collision; that the garage company presented its bill for the repairs to plaintiff which plaintiff paid. In these circumstances we think what the plaintiff paid for the repairs was sufficient to warrant the recovery by him of such sum without any further evidence since nothing appeared to cast suspicion

272; Roth vs. Fleck, 242 Ill. App. 396 and Sunbeam Storage Company vs. Cunningham, 210 Ill. App. 401. These cases hold that a paid bill for repairs made by a garage to a damaged automobile is admissible to prove the amount of damages and constitutes prima facie evidence of the reasonableness of the charge made for repairs. In the Ryalos case, supra, the court stated at page 271, "If the plaintiff was entitled to a verdict he could not recover more than the reasonable cost of the necessary repairs to his car. It was proper for him to prove the amount he had paid or become liable to pay and the fact that that amount was the usual and reasonable charge for labor and material and that the repairs were such as were necessary to be made. The receipted bill was admissible to prove that the repairs had actually cost the appellee so much money." The Supreme Court in this case cited with approval Cloyes vs. Hartle, 251 Ill. App. 183, wherein the court said at page 190, "The evidence shows that the automobile was taken to a concern which was engaged in the business of repairing automobiles. That plaintiff's car was then repaired by the garage company in the ordinary course of business and that the repairs were those required as a result of the collision; that the garage company presented its bill for the repairs to plaintiff which he paid. In these circumstances we think that the plaintiff paid for repairs was sufficient to warrant the recovery by him of such sum without any further evidence since nothing appeared to cast suspicion n

upon the transaction between the plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable."

In both the Byalos case, supra, and the Cloyes case, supra, the repairs which were represented by the paid bill were made necessary as a result of the collision. That evidence is lacking in the instant case.

The general rule with regard to the proof of damages is that the evidence must afford data, facts, and circumstances reasonably certain from which a court or jury may find the actual loss and the plaintiff must show by a preponderance of the evidence the damages caused by the injuries complained of. There must be proof that the damage sought to be recovered has occurred and that it was caused by the wrong of the defendant and was of the extent and amount thereof. 15 Am. Jur. 796. Damages sought to be recovered must be shown with reasonable certainty both as to their nature and in respect to the cause from which they proceed, and the plaintiff must prove the casual connection between the injury and the necessity for the repairs made. 25 C.J.S. 793.

In view of the fact that the plaintiff has failed to show that the repairs which were made by the Bud Weiser Motor Company following the accident were repairs which were necessitated because of the collision between the truck of the plaintiff and the car of the defendant, the judgment of the circuit court must be reversed and the cause remanded for another trial.

Reversed and remanded.

upon the transaction between the plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable."

In both the Ryalos case, supra, and the Gloyer case, supra, the repairs which were represented by the paid bill were made necessary as a result of the collision. That evidence is lacking in the instant case.

The general rule with regard to the proof of damages is that the evidence must afford data, facts, and circumstances from which certain from which a court or jury may find the actual loss and the plaintiff must show by a preponderance of the evidence the damages caused by the injuries complained of. There must be proof that the damage sought to be recovered was occasioned by the wrong of the defendant and the extent and amount thereof. 15 Am. Jur. 726. Damages sought to be recovered must be shown with reasonable certainty both as to their nature and in respect to the cause from which they proceed, and the plaintiff must prove the causal connection between the injury and the necessity for the repairs made. 25 C.J.S. 723.

In view of the fact that the plaintiff has failed to show that the repairs which were made by the Ford Motor Company following the accident were repairs which were necessitated because of the collision between the truck of the plaintiff and the car of the defendant, the judgment of the circuit court must be reversed and the cause remanded for another trial.

Reversed and remanded.

No. 12354

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

May Term, A. D. 1949.

Abstract

134

L.E. VICKERS,

Plaintiff-Appellee,

vs.

MARY C. BAILEY,

Defendant-Appellant.

Appeal from Circuit Court, La Salle County, Illinois.

Honorable Roy Wilhelm, Judge Presiding.

338 I.A. 237

BRISTOW, J. --- On March 7, 1948, on State Highway No. 6, approximately one mile east of Ottawa, there occurred an automobile accident wherein L. E. Vickers, whose car was proceeding westerly, was struck by a car coming from the east, which was being driven by Mary C. Bailey.

The plaintiff, seeking recovery of damages from the defendant was successful in a trial without a jury, the court entering a finding and judgment for the plaintiff in the sum of $150. The record fails to disclose the elements of damage that were considered, but appellant raises no question about this phase of the case. The only assignment of error is whether the evidence shows any negligence on the part of the defendant. No claim is made that plaintiff was guilty of contributory negligence.

There is little dispute in the evidence. Defendant was driving her car at about 35 miles per hour. As she approached a viaduct going down grade she struck a patch of ice and apparently lost control of her car and she drove across to the south side of the pavement and crowded plaintiff's car upon the embankment to the south of the paved highway. Earlier in the day defendant had driven over this highway enroute to Chicago. It was upon her return that the

accident occurred. The pavement generally was not icy, but the temperature was about twelve degrees below freezing. Plaintiff testified with reference to her driving after she had started to skid, "Just after it started to skid, I tried it, and it wouldn't go, so I let it go."

Appellant's counsel relies principally upon two cases, namely, Bradley v. Thomas M. Madden Company, 333 Ill. App. 153, and Moir v. Hart, 189 Ill. App. 566. In the first case, the accident occurred on Roosevelt Road in Chicago. This was a four-lane highway and was covered with ice at the time of the accident. The defendant's car therein barely skidded over the center line. In the instant case, defendant crossed two lanes of traffic and drove plaintiff's car off the highway. In the second case, cited above, the defendant suddenly undertook to avoid a pedestrian who had jumped in front of his car and in doing so skidded into a parked car. These authorities are readily distinguishable from the case under consideration.

Appellant offers no explanation why she did not have her car under better control after striking the ice. We think the trial court did not err in finding her guilty of negligence and assessing damages therefor.

Judgment Affirmed.

No. 10285

Abstract

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1948

338 I.A. 287

LEON POTTEI, Plaintiff-Appellee,	Appeal from Circuit Court, Henry County.
VS.	
LEROY DEMANES, Defendant-Appellant.	Honorable Ray I. Klingbiel, Judge Presiding.

BRISTOW, J.:-- Defendant, Leroy Demanes, is appealing from a judgment of the circuit court of Henry County entered on a jury verdict awarding plaintiff, Leon Pottei, $15,000.00 for personal injuries sustained when he was struck by an automobile, driven by defendant, while traversing an intersection.

The appeal presents for determination the issues of whether the evidence of defendant's negligence and plaintiff's due care warranted submission of the cause to the jury, whether the verdict was manifestly against the weight of the evidence, and the propriety of certain instructions.

Inasmuch as the probable sequence of events is closely related to the topography of the area, this court will review the environs of the collision.

Main Street in Kewanee, Illinois, runs north and south, and is intersected by East 8th Street and West 8th Street. There is a jog in this latter street, whereby West 8th Street meets Main Street some 92 feet south of where East 8th Street runs into Main Street. On the southeast corner of East 8th Street and Main Street there is a gasoline service station, the south limit of which is directly across from the junction of West 8th Street and Main Street. The entire intersection is illuminated by a single light hung some 18 feet above the southeast corner.

Plaintiff, age 69, lived on East 8th Street, several houses east of the gasoline station. At about 12:00 A. M. on September 23, 1945, he was returning home from a neighborhood tavern located on West 3rd Street. He had walked east on 3rd Street to Main Street, on which he continued north, on the west side of the street, to the corner of West 8th Street. There, according to his testimony, he looked both north and south before attempting to cross, waited for two automobiles to pass north, and one to pass south, and then looked to see if any cars were coming from either direction. Upon seeing only the lights of a car some 500 feet to the south, plaintiff proceeded to cross to the east side of Main Street, but before he reached the east curb, he was struck by an automobile operated by defendant. He was hit by the left front side of the car, and was tossed into the air, hitting against the hood and windshield, and then carried forward with the moving car until it stopped. He finally landed either in the center of the intersection, or just south of the gas station, according to the conflicting testimony of defendant's witnesses on this point.

As a result of the impact, plaintiff was knocked unconscious, in which condition he remained for several hours. He sustained severe and permanent injuries, including a fracture of his leg which, after

two years, is still draining pus. This fact was indicated to the jury by plaintiff's attending physician.

Defendant, who was 21 years old at the time of the collision, testified that he had been to some four taverns through the course of the evening, and had taken one or possibly two drinks in each. He was driving with a girl whom he had met in the last tavern, and they intended to go to some eating place. However, defendant's car stalled while riding on 5th and Main Streets, and was pushed by the witness, Van Dierendonck. The bumpers of the car locked, and did not become separated until the cars were north of the corner of West 6th and Main Streets, whereupon the Van Dierendonck's car turned on East 7th Street, and defendant proceeded north on Main Street, until he collided into plaintiff, and felt the impact on the car.

According to defendant's testimony, he turned the car around immediately after the impact, so that the lights of his car would shine on the object he hit. He insists that he did not see plaintiff prior to that moment, however, he did not slow down nor give warning of his approach at the junction, with which he was thoroughly familiar, and did not know, therefore, whether plaintiff was on the crosswalk at the time of the collision.

Defendant offered the testimony of two witnesses who stated that the car lights were burning, that defendant was not driving fast, and was on the right side of the street. One of these witnesses saw plaintiff tossed into the air just at the precise moment that she looked back to see if other people were coming down the street.

On the basis of the foregoing evidence the jury returned a verdict of $15,000.00, upon which the court entered judgment, and defendant is appealing therefrom.

Defendant contends first that the court erred in refusing to direct a verdict in his favor on the ground that plaintiff offered

no evidence of defendant's negligence, and was, moreover, contributorily negligent as a matter of law, so as to preclude recovery. Defendant argues that he offered the testimony of two allegedly disinterested witnesses indicating that he was driving on the right side of the road, at about 25 to 30 miles per hour, with his headlights burning, and therefore, could not be deemed guilty of any negligence toward plaintiff.

However, an automobile owner or operator is not necessarily exempt from liability because he does not exceed the speed limit, ~~(Keesler v. , 157 Ill. App. 552)~~ for there is a common-law duty imposed upon him to exercise reasonable care in the control and operation of his vehicle in order to avoid colliding with other vehicles or pedestrians. Furthermore, he is charged with notice that pedestrians may cross the streets, and he has a duty to keep a lookout for them, particularly at intersections, (Harrison v. Bingheim, 350 Ill. 269; Moran v. Gatz, 390 Ill. 478), which duty adheres irrespective of any statutory enactments.

In addition thereto, the Motor Vehicle Code provides:

> "Where traffic control signals are not in place or in operation, the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any unmarked crosswalk at the intersection." (Ch. 95½, §171, Ill. Rev. Stats. 1947.)

Both the common law and statutory duties were analyzed by the court in Moran v. Gatz, supra. Plaintiff therein, a 61 year old woman, was struck by the defendant's car while crossing an intersection. She testified that she stopped at the curb to wait for passing cars, and after looking and noting two or three cars about a block away, she started across the street. As in the instant case, the defendant was driving with his dim lights burning, gave no warning as he approached the intersection, and stated that he did not see plaintiff until he hit her. The court held that defendant had both a common law and statutory duty to use reasonable care in the operation of his vehicle to avoid colliding with

pedestrians, and to keep a lookout for them, particularly at crosswalks, and whether he complied therewith was an issue for the jury, along with the issue of whether plaintiff exhibited due care for her own safety.

In the instant case, defendant was driving with his dim lights on, and neither slowed up materially, nor gave a warning as he approached the junction of West 8th Street and Main, with which he was familiar, at a speed of 25 to 30 miles per hour. He testified that he did not see plaintiff until he was struck and thrown up against the hood and windshield, and, therefore, did not know where the impact occurred, or whether plaintiff was on the crosswalk. The conjecture that plaintiff crossed diagonally, interposed in the argument, was purely gratuitous and was not substantiated by any evidence.

Plaintiff testified that he stopped at the curb to wait until one southbound and two northbound cars passed, and after looking again and seeing only some lights approximately 500 feet distant, he proceeded directly across the street on the crosswalk. His testimony was apparently corroborated by the physical circumstances that his body, after being tossed in the air and carried forward by the moving car until it stopped, finally landed in the center of the highway near the south edge of the driveway of the gas station.

Although defendant's witnesses use identical phrases in parts of their testimony, they are not consistent as to just where the body was found, but it appears to be somewhere in the center of West 8th Street, southwest of the gas station. It is apparent, therefore, that if plaintiff had crossed diagonally, he would have landed, after being hit by the moving car with such an impact, considerably further north on the highway, and it is more reasonable to assume that he crossed the street where, under the law, he had the right of way.

The fact that the area was illuminated only by the street light 18 feet high on the southeast corner of Main and East 8th Street would tend only to enhance, rather than excuse, defendant's duty to be vigilant and keep a lookout for pedestrians, (Hartwig v. Knapwurst, 178 Ill. App. 409) who, defendant knew, from his familiarity with the area, crossed at that point.

Defendant's witnesses are adamant in their testimony that his headlights were burning brightly, and defendant stated that he did have his dim lights turned on. He insists that he had no battery difficulties that might have affected the lights, and that the car was stalled while driving only because of trouble with the starter. Irrespective of the alleged brilliance of the lights, defendant did not see plaintiff when he was crossing the intersection.

The statutory requirement that vehicles be equipped with lights visible some 500 feet ahead (ch. 95½, §200, Ill. Rev. Stats, 1947) is designed for the guidance and benefit of drivers as well as for the protection of persons using the highway. (Skamenca v. Reeser, 294 Ill. App. 214; Carroll v. Krause, 295 Ill. App. 552). It has been held, therefore, that it is a question of fact for the jury whether a driver was negligent in failing to have lights casting a sufficient beam to enable him to see objects ahead. (Skamenca v. Reeser, supra; Carroll v. Krause, supra.) In these latter cases the issue was whether plaintiffs, who claimed they did not see certain objects ahead in the road, although their lights were allegedly burning, were negligent in not having sufficient illumination, so as to preclude them from recovering.

From the evidence adduced herein, either defendant's lights were not sufficiently bright to see objects in the roadway, or, if they did cast a beam visible 500 feet ahead, in compliance with the statute, defendant looked and failed to see what was clearly visible, an anomaly which the law does not permit, (Dee v. City of Peru, 343 Ill. 36); or, he did not keep a proper lookout for pedestrians at the intersection under his common law and statutory duty. It is our

judgment, therefore, that whether defendant's conduct was negligent, was clearly an issue for the jury, and the trial court did not err in refusing to direct a verdict for defendant.

Nor does it appear that the court erred in rejecting defendant's contention that plaintiff was contributorily negligent as a matter of law. It has been recognized that statutes giving pedestrians the right-of-way on crosswalks do not preclude the possibility of their being contributorily negligent; however, such statutes ordinarily make the issue of what constitutes reasonable observation before entering the crossing, an issue for the jury, unless it can be found that the pedestrian's conduct was so palpably contrary to that of a reasonably prudent person so as to contribute contributory negligence as a matter of law. (Moran v. Gatz, supra, and cases cited therein).

In the Moran case, the court stated:

> "The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law, but is a question for the jury, whether he was in the exercise of ordinary care for his own safety."

As hereinbefore noted, plaintiff offered uncontroverted evidence that he stopped at the curb to wait for cars to pass from both directions and saw only some lights about 500 feet away when he started across. Moreover, from our analysis of the evidence, it seems most reasonable to conclude that he proceeded straight across the street.

Under these circumstances, whether plaintiff's failure to keep a constant lookout, even after he determined that it was safe to cross, constituted contributory negligence, was, at most, a question for the jury, and could not be deemed "palpably contrary to the conduct of a reasonably prudent person."

With reference to defendant's contention that error was committed in permitting the attending doctor to point out the drainage

judgment, therefore, that whether defendant's conduct was negligent, was clearly an issue for the jury, and the trial court did not err in refusing to direct a verdict for defendant.

Nor does it appear that the court erred in rejecting defendant's contention that plaintiff was contributorily negligent as a matter of law. It has been recognized that ordinarily giving pedestrians the right-of-way on crosswalks is not proof of negligence if they being contributorily negligent; however, such statutes ordinarily make the issue of some contributory negligence conclusive of non existence of crossing, or issue for the jury, which is one to prove that the pedestrian crossing was in physical distress to that of a reasonably prudent person so as to warrant his crossing-any negligence as a matter of law. (Wagner v. Cole, supra, and cases cited therein).

In the instant case, Mr. Justice Jackson

"The trial court, in its jury instructions, said: 'Plaintiff contends that defendant was negligent in not giving plaintiff the right-of-way on a crosswalk. Defendant contends that plaintiff was guilty of contributory negligence in not giving defendant the right-of-way on a crosswalk. If you find that plaintiff was in the crosswalk, then defendant was under a duty to give him the right-of-way, unless plaintiff was in the crosswalk in such a manner as to be a hazard to defendant's car.'

In cases involving [illegible], statutory [illegible] conclusively abandon such as applied to the case at bar, [illegible] both directions and are quite [illegible] [illegible] by stopped cars. However, the [illegible] of the [illegible] it seems more reasonable to conclude that is [illegible] [illegible] on the street.

Under these circumstances, whether plaintiff failed to use ordinary care, even after [illegible] was in the crosswalk, [illegible] contributory negligence, was, at most, a question for the jury, and may not be deemed [illegible] in the conduct of a reasonably prudent person."

With reference to defendant's contention that [illegible] committed in permitting the intending doctor to point out the damage

of pus from plaintiff's leg in the presence of the jury, it is a recognized principle, which defendant acknowledges, that such matters are within the discretion of the trial court, and since there is no question of excessive damages, or controversy concerning the extent of the injuries, there was no abuse of discretion. (Wagner v. Chi. R. I. & Pac. Ry. Co., 277 Ill. 114; Chi. & Alton R. Co. v. Clausen, 173 Ill. 100).

Defendant further interposes objections to two instructions given by the trial court. Instruction No. 20 provided:

> "The jury are instructed that while as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still, if the jury finds that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it will be sufficient for the jury to find the issues in his favor."

This instruction has been alternately approved (Fennon v. Morgan, 228 Ill. App. 415; Dodd v. Chi. City Ry., 153 Ill. App. 85; Chi. City Ry. Co. v. Fonimore, 199 Ill. 9; Taylor v. Heising, 164 Ill. 331) and criticized (Molloy v. Chi. Rapid Transit Co., 335 Ill. 164; Wolczek v. Public Service Co., 342 Ill. 482; Reivitz v. Chi. Rapid Transit Co., 327 Ill. 207) without any authorities being overruled. The more recent pronouncements indicate that the instruction may tend to emphasize the weight of plaintiff's evidence (Wolczek v. Public Service Co., supra). However, in the majority of cases where the instruction has been criticized, it has not been deemed reversible error, (Reivitz v. Chi. Rapid Transit Co., supra) and where there was a reversal, the instruction was merely one of many errors in a record of conflicting evidence, in sharp contrast to the instant case.

Instruction No. 6 has also been criticized in part by the courts. This instruction provided:

> "When the court speaks of the preponderance of the evidence in these instructions, such preponderance may not be entirely determined by the number of witnesses testifying to a particular fact or facts, but in determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses

for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances, the jury may determine upon which side is the preponderance of the evidence."

It is clear that the number of witnesses is a proper element to be considered in determining where the preponderance of the evidence lies. (Rudin v. Wheelock, 249 Ill. App. 249). It is equally well established that the number of witnesses does not necessarily determine the preponderance of the evidence. While this instruction may not sufficiently emphasize the weight of numbers, nevertheless, it does not warrant the inference that the number of witnesses is not an element to be considered, or that the jury could disregard the matter of numbers and arbitrarily find the preponderance on the side having the smaller number of witnesses.

Even in the case of Elgin, Joliet & Eastern Ry. Co. v. Lawler, 229 Ill. 621, where the instruction was initially criticized, the cause was not reversed since the court felt that the jury was sufficiently apprised of the law by other instructions.

The Illinois courts have adhered to the doctrine that instructions should be construed as a whole, and minor irregularities should not be permitted to control. (Kavanaugh v. Washburn, 321 Ill. App. 250.) The court, in the Kavanaugh case, supra, stated at p. 255:

"Instructions are handed to the trial judge at the close of the case, and just before argument. Naturally, they are partisan in character with each litigant endeavoring to present his contention in as skillful and forceful a manner as possible. It is inevitable that a trial judge in the midst of a hotly contested case, will sometimes fail to detect all of the language of the various instructions that may be inadvertently used. . . ."

It is our judgment that, although this instruction has been criticized in some cases, inasmuch as every phase of this case was covered by instructions adequately apprising the jury of the law,

for seeing and knowing the things about which they testify, their demeanor and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their evidence, their interests in view of all the other evidence, facts and circumstances, the jury may determine upon which side is the preponderance of the evidence."

It is clear that the number of witnesses is a proper element to be considered in determining where the preponderance of the evidence lies. (Smith v. McCaleb, 242 Ill. App. 248). It is equally well established that the number of witnesses does not necessarily determine the preponderance of the evidence. While this instruction may not sufficiently emphasize the weight of [illegible], nevertheless, it does not warrant the inference that the number of witnesses is not an element to be considered, or that the jury could disregard the matter of number and arbitrarily fix the preponderance on the side having the smaller number of witnesses.

[illegible] case of Kelly, McCann v. [illegible], 252 Ill. 401, [illegible] contradiction and inherently improbable, the cases are not precedent since the court will [illegible] factually explained of the law by [illegible].

The Illinois courts have adopted in the instant case that [illegible] should be considered as a whole, and which [illegible] should not be permitted to control. (Lorenzen v. [illegible], 251 Ill. App. 220.) The court, in the [illegible], supra, stated at p. 226:

> "Instructions are issued to the jury from at the close of the case, and are [illegible]. Normally, they are written in accordance with [illegible] and [illegible] to present his contention in a clear, [illegible] and [illegible] manner as possible. It is inevitable that a trial judge in the midst of a busy courtroom case, will sometimes fail to detect all of the language of the various instructions that may be inadvertently used. . . ."

It is our judgment that, although the instruction has been criticized in some cases, inasmuch as every element of this case was covered by instructions adequately apprising the jury of the law,

under the harmless error doctrine, the court cannot, in good conscience, rule that a possible interpretation of this instruction shall be the sole ground for reversal of the case, and thereby unwarrantably increase and prolong litigation, contrary to public policy.

Defendant argued the propriety of the instructions at the hearing on his motions for a new trial and for judgment notwithstanding the verdict, and the trial court which saw and heard the witnesses was in a better position to evaluate the evidence, and determine whether the jury could have been misled by any interpretation of these instructions. Unless the judgment of that court, entered on the verdict, is manifestly against the weight of that evidence, that judgment should not be disturbed. (Dustko v. Pletka, 329 Ill. 189). It appears that the circuit court committed no error in this cause and its judgment should properly be affirmed.

JUDGMENT AFFIRMED.

~~Dove, J., Dissenting.~~

under the harmless error doctrine, the court cannot, in good conscience, rule that a possible misinterpretation of this instruction shall be the sole cause for reversal of the case, and thereby unnecessarily increase and prolong litigation, contrary to public policy.

Defendant argued the propriety of the instructions at the hearing on his motions for a new trial and for judgment notwithstanding the verdict, and the trial court which saw and heard the witnesses was in a better position to evaluate the evidence, and determine whether the jury could have been misled by any interpretation of these instructions. Unless the judgment of that court, entered on the verdict, is manifestly against the weight of the evidence, that judgment should not be disturbed. (Dowling v. Lasky, 329 Ill. 169). It appears that the car did enter intersection in this manner and the jury could properly find defendant.

Reversed Affirmed.

Abstract

Gen. No. 10242 Agenda No. 21

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1949

3381 I.A. 2881

JOSEPH DE YOUNG Plaintiff-Appellee v. ESTHER DE YOUNG Defendant-Appellant	APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY

Per Curiam:

Joseph DeYoung filed his complaint for divorce against his wife, Esther DeYoung in the Circuit Court of Kankakee County on December 30, 1946, in which he alleged that his wife wilfully deserted him on December 29, 1945. The defendant, Esther DeYoung answered denying the desertion and also filed a counterclaim for divorce on the grounds of extreme and repeated cruelty and also on the grounds of excessive use of intoxicating liquors over a period of more than two years just prior to December 29, 1945. She further alleged that he had subjected her to a course of cruel and inhuman treatment over a period of several years and that because of this treatment and his excessive use of intoxicants she was compelled to and did leave him on December 29, 1945, and had been obliged to live separate and apart from him

ABSTRACT

Gen. No. 10248 — Agenda No. 27

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1949

JOSEPH DE LUCA Plaintiff-Appellee v. ESTHER DE LUCA Defendant-Appellant	Appeal from the CIRCUIT COURT of KANKAKEE COUNTY

Mr. Justice:

Joseph DeLuca filed his complaint in divorce against his wife, Esther DeLuca, in the Circuit Court of Kankakee County on December 23, 1946, in which he alleged that his wife wilfully deserted him on December 29, 1945. The defendant, Esther DeLuca, answered denying the desertion and also filed a counterclaim for divorce on the grounds of extreme and repeated cruelty and also on the grounds of excessive use of intoxicating liquors over a period of more than two years just prior to December 29, 1946. The former alleged that he had subjected her to a course of cruel and inhuman treatment over a period of several years and that because of this treatment and his excessive use of intoxicants she was compelled to and did leave him on December 29, 1945, and had been obliged to live separate and apart from him

continuously since that date. The plaintiff's filed an answer to the counterclaim denying the charges therein made and the issues made by the pleadings were heard by the Chancellor, resulting in a decree awarding the plaintiff a divorce on the grounds of desertion and dismissing the defendant's counterclaim.

After the entry of the decree, but prior to perfecting this appeal, the plaintiff, Joseph DeYoung died. An administrator of his estate having been appointed, an order of substitution was entered in the circuit court and Alexander J. DeYoung, Administrator of the estate of Joseph DeYoung, deceased, appears in this court as appellee. The defendant and counterclaimant, Esther DeYoung, prosecutes this appeal.

Appellant insists that the findings and decree of the trial court are against the manifest weight of the evidence and that the court erred in not finding that the plaintiff consented to the separation.

The record discloses that the parties were married on June 5, 1932. The plaintiff had been previously married and was 71 years of age at the time of the hearing. He was a butcher by trade and at one time operated a tavern in Momence and had accumulated some property. On several occasions, during their married life, appellant had left her husband and would be gone three or four months at a time, during which time, she stayed with her mother and after her mother's death, she would go to the home of her sister, Ella.

Joseph DeYoung testified that when his wife left him on December 29, 1945 she went with her sister, Ella Flynn, saying

continuously since that date. The plaintiff's filed an answer to the counterclaim denying the charges therein made and the issues made by the pleadings were heard by the Chancellor, resulting in a decree awarding the plaintiff a divorce on the grounds of desertion and dismissing the defendant's counterclaim.

After the entry of the decree, but prior to perfecting this appeal, the plaintiff, Joseph Delong died. An administrator of his estate having been appointed, an order of substitution was entered in the circuit court and Alexander J. Delong, Administrator of the estate of Joseph Delong, deceased, appears in this court as appellee. The defendant and counterclaimant, Esther Delong, prosecutes this appeal.

Appellant insists that the findings and decree of the trial court are against the manifest weight of the evidence and that the court erred in not finding that the adultery occasioned by the separation.

The record discloses that the parties were married on June 6, 1922. The plaintiff had been previously married and was 71 years of age at the time of the hearing. He was a butcher by trade and at one time operated a tavern in Nemacolin and had accumulated some property. In several occasions, during their married life, appellant had left her husband and would be gone three or four months at a time, during which time, she stayed with her mother and after her mother's death, she would go to the home of her sister, Ella.

Joseph Delong testified that when his wife left him on December 29, 1919 she went with her sister, Ella Flynn, saying

that ~~xxxxxxxx~~ she would call him up in a day or so but that she never called him and finally he went to see her at her sister's home, at which time he offered to take her to a hospital near his home, as she was complaining of being ill. Appellant declined to go with him and told him, "I don't think that I will go back to Memence. You'd better get a divorce." He then asked her how long she would stay. "I am not coming back, get a divorce on desertion." He further testified: "If my wife would come back and live with me now, I would take her back and care for her as long as I live."

Monroe Verhines testified on behalf of plaintiff to the effect that he ran a grocery and food market and had known the DeYoungs for about 15 or 18 years and that they traded at his store: that Mr. DeYoung had told him that when his wife wanted anything at the store to let her have it, that she always had money and that she bought the groceries; that he never had seen Mr. DeYoung intoxicated but had taken a drink with him on a few occasions.

Garrett DeYoung, plaintiff's son, testified that he had been in his father and stepmother's home many, many times and that his father always treated his stepmother well and the testimony of plaintiff's daughter-in-law, Marie DeYoung, was to the same effect. She also testified that she had been in the DeYoung home on the day before the defendant left and had seen the plaintiff and at that time he was sober.

In her own behalf the appellant testified that she had left her husband on several occasions because of his treatment of her; that she had gone to live with her mother on these occasions while her mother was alive and after her mother's

that xxxxxxxx she would call him up in a day or so, but that she never called him and finally he went to see her at her sister's home, at which time he offered to take her to a hospital near his home, as she was complaining of being ill. Appellant declined to go with him and told him, "I don't think that I will go back to Kansas. You'd better get a divorce." He then asked her how long she would stay. "I am not coming back, get a divorce on desertion." He further testified: "If my wife would come back and live with me now, I would take her back and care for her as long as I live."

Morris Vermines testified on behalf of plaintiff to the effect that he ran a grocery and feed market and had known the Delonnes for about 15 or 16 years and that they traded at his store; that Mr. Delonne had told him that when his wife wanted anything at the store to let her have it, that she always had money and that she\ought the groceries; that he never had seen Mr. Delonne intoxicated but had seen a drink with him on a few occasions.

Garrett Delonne, plaintiff's son, testified that he had been in his father and stepmother's home many, many times and that his father always treated his stepmother well and the testimony of plaintiff's daughter-in-law, Marie Delonne, was to the same effect. She also testified that she had been in the DeYoung home on the day before the defendant left and had seen the plaintiff and at that time he was sober.

In her own behalf the appellant testified that she had left her husband on several occasions because of his treatment of her; that she had gone to live with her mother on these occasions while her mother was alive and after her mother's

death she went to live with her sister; that her husband had threatened her life several times and that the last time he did so was on December 29, 1945, the day she left; that when she left on December 29, 1945, she was very nervous and that there was not sufficient food in the house; that after she left plaintiff she was in a sanitarium for six months and the expense of this was paid by her family and not by plaintiff; that plaintiff came home intoxicated many times; that she did not want to go back to the plaintiff because she could not go through any such strain/as she had been through ~~again~~ again and that he might take her life and that she was not going to try to make a go of their marriage again.

Ella Flynn testified that she was a sister of the defendant and that she lived in Chicago with her mother until her mother's death, after which she continued to live there alone; that on December 28, 1945 she went to Momence in response to a telephone call from her sister to bring her home. That she arrived at her sister's home about 4:30 P.M. and although it was only a short time after Christmas, there was no sign of any Christmas activity in her sister's home; that there was little food in the house; that plaintiff came home late that night and went to the ice box and got something to eat; that he had been drinking and he asked his wife why she didn't sign some papers that he had asked her to sign; that he cursed her and told her she was "too sneaky and a rowdy and a thief," and said: "I ought to put you against the wall and shoot you full of bullets"; that the next morning she (the witness, Ella Flynn) was up ahead of the plaintiff and when he saw her he

death she went to live with her sister; they had husband had threatened her life several times and that the last time he did so was on December 22, 1946, the day she left; that when she left on December 22, 1946, she was very nervous and that there was not sufficient food in the house; that after she left plaintiff she was in a sanitarium for six months and the expense of this was paid by her family and not by plaintiff; that plaintiff came home intoxicated many times; that she did not want to go back to the plaintiff because she could not go through any more abuse\again\ as she had been through xxxx and that she right then left and that she was not going to try to make a go of their marriage again.

The Court restored that she was a citizen of the Defendant and that she lived in marriage with her husband until her husband's death, after which she returned to live there alone; that on December 22, 1946 she went to Tennessee in response to a telephone call from her sister, in Dyer County, Tenn. She arrived at her sister's home about 4:30 P.M. and although it was only a short time after Christmas, there was no sign of any Christmas activity in her sister's home; that there was little food in the house; that plaintiff came home late that night and went to the ice box and got something to eat; that he had been drinking and he asked the wife who she might sign some papers that he had asked her to sign; that he walked her and told her she was "too sneaky and a young and a thief," and said: "I ought to put you against the wall and shoot you full of bullets"; that the next morning she (the witness, Ella Flynn) was up ahead of the plaintiff and then he saw her he

asked if she had been there last night; that she told him she had, but she was asleep and didn't get up when he came in; that the next morning the plaintiff told them that he would take them to the bus but that he fooled around so long that they called a cab in order to make the bus. She further testified that she never saw the plaintiff "display" only that one night; that she was not married herself and was not in favor of appellant's marriage and that her sister's marriage was against her religion.

Appellant testified that the plaintiff came home intoxicated quite often and that he frequently cursed her and threatened to take her life; that on December 29, 1945 he had been drinking and threatened to kill her and that she left him to go to the home of her sister and for six months thereafter was in a sanitarium; that she would not go back to him and was not going to try to live with him again.

The record further discloses that when she left on December 29, 1945 she left many of her dresses, hats and other articles of clothing at her home; that she never asked for them and plaintiff never sent them to her. There is no evidence that plaintiff ever struck the defendant. He testified that he drank moderately but was perfectly sober on the night of December 28, 1945 and the morning of December 29, 1945. He also denied that he ever threatened or cursed the defendant or was ever in any way unkind to her.

Counsel for appellant insist that the evidence in this record does not show a wilful desertion on the part of defendant, but shows a separation by agreement. She did not raise this issue by her answer to the complaint and this

asked if she had been there last night; but she said she was tired, and she was sorry she didn't get up when he came in; that she went morning the plaintiff said she was in so late that she was not up to the top but that he finally asked them to come down and they called a cab in order to make the law. The Justice testified that she never saw the plaintiff "drinking" only that she might; that she was the married herself and was not in favor of expulsion's marriage and that her sister's marriage was against her religion.

Appellant testified that the relationship came from intimacy with Miss Clara Jan as frequently varied for and terminated in late Jan July, that on December 20, 1945 he had been drinking and intended to kill her and that in left the to go to the home of her sister and from the sister's thereafter met in a saloon; that he still in love had to him and was the going to try to live with her again.

The Miss Jordan testified she was the left on December 20, 1945 for left away of her house, left and gone against of shooting at her home; that she have said the time and plaintiff never went back since to her. There is no evidence that plaintiff ever shot the defendant. Mr. testified that he heard unusually loud was overtaken when on the night of December 20, 1945 and the shooting of December 21, 1945. He also testified that he ever threatened to overtake defendant or see her in any way making to her.

Counsel for appellant insists that the evidence in this record does not show a wilful desertion on the part of defendant, but shows a separation by agreement. The jury not raise this issue by her answer to the complaint and this

contention ignores the allegation in her counterclaim to the effect that she was compelled to and did leave the plaintiff on December 29, 1945, and was obliged to remain separate and apart from him continuously since that date because of his treatment of her. It also ignores the testimony of appellant herself that she "left Joseph DeYoung in 1945, the last time he threatened me." The fact that plaintiff interposed no objection to her going home with her sister on December 29, 1945, taken in connection with the pleadings and all the evidence found in this record does not indicate a separation by agreement of the parties but warrants the conclusion arrived at by the chancellor that appellant wilfully deserted her husband without just cause. It is the law that if a husband and wife agree to separate, or if one knowingly consents to the other's leaving, neither can obtain a divorce on the ground of desertion. This consent, however, must be based on the knowledge that the party who is leaving intends a permanent separation. If there is a lack of knowledge that the other party intends a permanent separation, there is no consent. (27 C.J.S., pp. 573-4).

When defendant left on December 29, 1945, plaintiff did not object to her leaving because he did not know she intended a permanent separation. She had left in a similar way on other occasions, leaving some of her clothing and personal belongings, but each time she returned. When plaintiff learned that she was not coming back after she left the last time, he went to see her and she did not deny that upon that occasion he offered to bring her back to Kankakee to a hospital, and asked her to return to him and their home but

contention ignored the allegation in her counterclaim to the effect that she was compelled to and did leave the plaintiff on December 29, 1946, and was obliged to remain separate and apart from him continuously ~~[illegible]~~ since that date because of his treatment of her. It also ignores the testimony of appellant herself that she "left Joseph McYoung in 1940, the last time he threatened me." The fact that plaintiff interposed no objection to her going home with her sister on December 29, 1946, taken in connection with the pleadings and all the evidence found in this record does not indicate a separation by agreement of the parties but warrants the conclusion arrived at by the chancellor that appellant willfully deserted her husband without just cause. It is the law that if a husband and wife agree to separate, or if one knowingly consents to the other's leaving, neither can obtain a divorce on the ground of desertion. This consent, however, must be based on the knowledge that the party who is leaving intends a permanent separation. If there is a lack of knowledge that the other party intends a permanent separation, there is no consent. (27 C.J.S., pp. 374-4).

When defendant left on December 29, 1946, plaintiff did not object to her leaving because he did not know she intended a permanent separation. She had left in a similar way on other occasions, leaving some of her clothing and personal belongings, but each time she returned. Then plaintiff learned that she was not coming back after she left the last time, he went to see her and she did not tell him that upon that occasion he offered to bring her back to Hamblen to a hospital, and asked her to return to him and their home but

she refused and told him she did not intend to live with him any more and for him to divorce her on the ground of desertion.

The allegations of the counterclaim are not sustained by the evidence and it was properly dismissed. The findings of the Chancellor upon the issues made by the complaint and answer are not manifestly against the weight of the evidence and the decree should therefore be affirmed. (Rafferty v. Rafferty, 337 Ill. App. 277).

Decree affirmed.

she returned and told him she did not intend to live with him any more and for him to divorce her on the ground of desertion.

The allegations of the counterclaim are not established by the evidence and it was properly dismissed. The finding of the chancellor upon the issues made by the complaint and answer are not manifestly against the weight of the evidence and the decree should therefore be affirmed. (Rafferty v. Rafferty, 337 Ill. App. 277).

Decree affirmed.

O.K. Draft

Dissent?

Abstract

Gen. No. 10242 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1948 338 I.A. 288

JOSEPH DE YOUNG Plaintiff-Appellee v. ESTHER DE YOUNG Defendant-Appellant	APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY

Dove, J.

On the 30th day of December 1946 Joseph De Young filed his complaint seeking a divorce from Esther De Young on the ground of desertion and alleging that she deserted him on December 29, 1945. The defendant answered denying she wilfully deserted the plaintiff on December 29, 1945 amd denied that said desertion has continued without interruption for one year. She also filed a counter claim for divorce alleging that daily from 1940 until December 29, 1945, counter-defendant frequently struck and choked her and that on April 15, 1945 and on December 28, 1945 he struck and choked her and threatened to kill her; that in 1940 he commenced the excessive use of intoxicating liquor and for more than 2 years prior to December 29, 1945 had been guilty of habitual drunkenness and concluded that because of said conduct and plaintiff's failure to provide

Abstract

Gen. No. 10242 Agenda No. 1

IN THE

APPELLATE COURT OF ILLINOIS

SIXTH DISTRICT

MAY TERM, A. D. 1943

JOSEPH DE YOUNG Plaintiff-Appellee v. KATHERINE DE YOUNG Defendant-Appellant	APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY

Love, J.

On the 22nd day of December 1942 Joseph De Young filed his complaint seeking a divorce from Esther De Young on the ground of desertion and alleging that she deserted him on December 19, 1942. The defendant answered denying she wilfully deserted the plaintiff on December 19, 1942 and denied that said desertion has continued without intermission for one year. She also filed a counter claim for divorce alleging that daily from 1940 until December 23, 1942, counter-defendant frequently struck and choked her and then on April 18, 1942 and on December 22, 1942 he struck and choked her and threatened to kill her; that in 1940 he commenced the excessive use of intoxicating liquor and for more than 2 years prior to December 23, 1942 had been guilty of habitual drunkenness and concluded that because of said conduct and plaintiff's failure to provide

for her, defendant did leave the plaintiff on or about December 29, 1946 and has been compelled to live separate and apart from him since that time. An answer was filed to this counter claim denying the allegations thereof. The issues thus made were tried by the court without a jury, resulting in a decree dismissing the counter claim for want of equity and granting the plaintiff a divorce on the ground of desertion. After the entry of the decree plaintiff died and Alexander J. De Young, his administrator appears in this court as appellee, an order of substitution having been entered in the trial court. Appellee's intestate will be hereafter referred to as the plaintiff and appellant as defendant.

The evidence discloses that the parties were married on June 5, 1932. Plaintiff had been previously married and was 71 years of age at the time of the hearing. He was a butcher by trade and at one time operated a tavern in Momence and had accumulated some property. On several occasions during their married life the defendant would leave their home and be gone for several months during which time she stayed with her mother and after her mother's death she would go to her sister's. The defendant testified that the plaintiff came home intoxicated very often, frequently cursed her and threatened to take her life. That on December 29, 1945 he had been drinking and threatened to kill her, that she left him and went to the home of her sister and for six months thereafter she was in a sanitarium, that she would not go back to him and was not going to try to live with him again. Ella Flynn, a sister of the defendant, testified that she went to

for her, defendant did leave the plaintiff on or about December 22, 1946 and has been compelled to live separate and apart from him since that time. An answer was filed to this counter claim denying the allegations thereof. The issues thus made were tried by the court without a jury, resulting in a decree dismissing the counter claim for want of equity and granting the plaintiff a divorce on the ground of desertion. After the entry of the decree plaintiff died and Alexander J. De Young, his administrator appears in this court as appellee, an order of substitution having been entered in the trial court. Appellee's intestate will be hereafter referred to as the plaintiff and appellant as defendant.

The evidence discloses that the parties were married on June 3, 1932. Plaintiff had been previously married and was 71 years of age at the time of the hearing. He was a butcher by trade and at one time operated a tavern in Kenmore and had accumulated some property. On several occasions during their married life the defendant would leave their home and be gone for several months during which time she stayed with her mother and after her mother's death she would go to her sister's. The defendant testified that the plaintiff came home intoxicated very often, frequently cursed her and threatened to take her life. That on December 22, 1946 he had been drinking and threatened to kill her, that she left him and went to the home of her sister and for six months thereafter she was in a sanitarium, that she would not go back to him and was not going to try to live with him again. Ella Flynn, a sister of the defendant, testified that she went to

the home of the plaintiff and defendant, arriving there about 4:30 P.M, December 28, 1945; that plaintiff was not there but came home about 1:30 A.M., went to the ice box and got something to eat and then inquired of the defendant "why don't you sign those papers," defendant did not answer and he then said: "No, you wouldn't sign this paper, you are too sneaky and a rowdy and a thief, I ought to put you against the wall and shoot you full of bullets." This witness then continued: "The next morning, I was up ahead of Joseph De Young and when he saw me he said, 'were you here last night?'. I said, 'Yes, but I fell asleep so didn't get up'. I didn't tell him that I heard what I did. ***** When she (the defendant) got up he (the plaintiff) told us he would take us to the bus but he fooled around until it was too late so I called a veteran cab. I think the papers he wanted signed were for the Halstead Street place."

The plaintiff testified that on the 29th of December Ella Flynn, defendant's sister, came to their home and said she would take defendant to her home and that the change would do her good, that she would call plaintiff in a day or so but she never called so plaintiff went to the sister's home in Chicago and took some eggs with him for his wife; that the sister said she did not want them but he left them and at that time his wife told him her sister was sick, that the house where they were living belonged to both of them, that she was the housekeeper and they had roomers, that defendant then said: "I don't think I will go back to Momence, you better get a divorce." As abstracted, this is then what occurred: "I asked her how long will you stay and she said I am not coming back, get a divorce on desertion. She asked me when the time would be up and I said it takes a

the home of the plaintiff and defendant, arriving there about 4:30 P.M. December 26, 1943; that plaintiff was not there but came home about 1:30 A.M., went to the ice box and got something to eat and then inquired of the defendant "why don't you sign those papers," defendant did not answer and he then said: "No, you wouldn't sign this paper, you are too sneaky and a rowdy and a tutor, I ought to put you against the wall and shoot you full of bullets." This witness then continued: "The next morning, I was no friend of Joseph De Young and when he saw me he said, 'were you here last night?'. I said, 'Yes, but I tell sailors to MIND I get up'. I didn't tell him that I heard what I did. When then she (the defendant) got up he (the plaintiff) told me he would take me to the bus but he fooled around until it was too late so I called a veteran cab. I think the papers he wanted signed were for the Molested Street class."

The plaintiff testified that on the 29th of December Ella Flynn, defendant's sister, came to their home and said she would take defendant to her home and that the change would do her good, that she would call plaintiff in a day or so but she never called so plaintiff went to the sister's home in Chicago and took some cups with him for his wife; then the sister said she did not want them but he left them and at that time his wife told him her sister was sick, then the house where they were living belonged to both of them, that she was the housekeeper and they had roomers, that defendant then said: "I don't think I will go back to Momence, you better get a divorce." As abstracted, this is then what occurred: I asked her how long will you stay and she said I am not coming back, get a divorce on desertion. She asked me then the time would be up and I said it takes a

year."

The evidence is, that when defendant left on December 29, 1945 she left many of her dresses, hats and other articles of her clothing at their home; that she never asked for them and plaintiff never sent them to her. There is no evidence that the plaintiff ever struck his wife, and he denied that he threatened her in any way or was unkind to her. He stated he drank moderately and was perfectly sober the night of December 28th and the morning of December 29th.

Monroe Verhimes testified that he conducted a grocery store and food market in Momence, had known the plaintiff for fifteen or eighteen years, that the parties hereto traded at his store, that defendant bought the groceries and always had money; that plaintiff had told him that any time defendant wanted any thing she could have it but she only asked for credit once or twice. This witness testified that he had seen plaintiff take a drink but never saw him intoxicated. The son of the plaintiff testified that he had frequently been in his father's and step-mother's home, had never seen his father strike his step-mother and that he always treated her well. Plaintiff's daughter-in-law gave similar testimony, stating that she was at their home on the 28th of December, the day before defendant left and that the plaintiff was sober and defendant was amply provided for.

The law is that plaintiff here was required to prove that the defendant left him without any reasonable cause and against his will, that if the parties separated by mutual consent or if the plaintiff consented to the

year.

The evidence is, that when defendant left on December 7th, 1943 she left many of her dresses, shoes and other articles of her clothing at their home; that she never asked for them and plaintiff never sent them to her. There is no evidence that the plaintiff ever struck his wife, and he denied that he threatened her in any way or was unkind to her. He stated he treated defendant and was perfectly sober the night of December 7th and the morning of December 8th.

Women witnesses testified that he attempted a reconciliation with defendant in Georgia, and later the plaintiff for fifteen or eighteen years, but the parties never lived at his home, that defendant thought the plaintiff had money; that plaintiff had told his friends he wanted any thing she could have it but she only asked for credit from the boys. This testimony testified that he had been plaintiff's home a dozen times when he intoxicated. The son of the plaintiff testified that he had frequently been in his father's and step-mother's home, and he was when his father strike his step-mother and they in change treated her well. Plaintiff's daughter-in-law gave similar testimony, stating that she was at their home on the 6th of December, the day before defendant left and that the plaintiff was sober and defendant was empty handed.

The law in this plaintiff here was required to prove that the defendant left his without any reasonable cause and against his will, that it the marital separation by mutual consent or if the plaintiff consented to the

original separation he is not entitled to a divorce on the ground of desertion. Floberg v. Floberg, 358 Ill. 626. The only conclusion that can be arrived at from a consideration of the evidence in this record is that defendant left on December 29, 1945, as she had done on several previous occasions to visit her sister. When she left, nothing was said about her not coming back. He not only acquiesced in her going but consented that she should go, gave her money and offered to take her and her sister to the bus station. He fully expected her to return and the fact that she left much of her wearing apparel, which was still at their home at the time of the hearing, indicated her intention to return. After she had been gone some time he went to see her at her sisters, took some eggs and inquired of her how long she intended to stay with her sister. It is true that at this time, after the parties had "had a talk", defendant told the plaintiff she didn't think she would go back to Momence and that he had better get a divorce on the ground of desertion. This is the reflection of her attitude at that time and not at the time she left.

original separation he is not entitled to a divorce on the ground of desertion. Flohrer v. Flohrer, 358 Ill. 626. The only conclusion that can be arrived at from a consideration of the evidence in this record is that defendant left on November 20, 1945, as she had done on several previous occasions to visit her sister. When she left, nothing was said about her not coming back. He not only acquiesced in her going but commented that she should give her money and offered to take her and her sister to the bus station. He fully expected her to return and the fact that she left much of her wearing apparel which xx was still at their home at the time of the hearing, indicated her intention to return. After she had been gone some time he went to see her at her sister's, took some gifts and inquired of her when she intended to stay with her sister. It is true that at this time after the parties had "had a talk", defendant told the plaintiff she didn't think she would go back to Kansas and that he had better get a divorce on the ground of desertion. This is the reflection of her attitude at that time and not at the time she left.

In Floberg v. Floberg, 358 Ill. 626 the court says: "It is the policy of our courts to give the divorce laws a strict rather than a liberal construction. The statute providing for a divorce on the ground of desertion, contemplates a wilfulness without any reasonable cause. The living separate and apart by mutual consent of the parties does not constitute a wilful desertion within the divorce statute."

In Larimore v. Larimore, 299 Ill. App. 547, the court said: "Plaintiff, to establish the charge of desertion, was required to prove that the defendant had absented herself or remained away from him without any reasonable cause and against his will, Garvy v. Garvy, 282 Ill. App. 485. It is also the law that if married parties separate by mutual agreement and so remain apart, there is no such legal desertion on the part of either as constitutes ground for divorce, Lyons v. Lyons, 231 Ill. App. 568. Where the complainant in a divorce proceeding has, either expressly or impliedly, consented to the original separation or its continuance and has not revoked such consent, he is not entitled to a divorce for desertion, 19 Corpus Juris, P. 64, Sec. 120; and if such appears in defense, it is a bar to the action."

The allegations of the counter claim are not sustained by the evidence and the chancellor properly dismissed it. Neither are the allegations of the original complaint sustained by the evidence and the decree must therefore be reversed.

Decree reversed.

In Flobery v. Flobery, 287 Ill. 407 the court says:

"It is the policy of our courts to give the divorce laws a strict rather than a liberal construction. The statute providing for a divorce on the ground of desertion, contemplates a willfulness without any reasonable cause. The living separate and apart by mutual consent of the parties does not constitute a willful desertion within the divorce statute."

In Lerimore v. Lerimore, 278 Ill. App. 647, the court said: "Plaintiff, to establish the charge of desertion, was required to prove that the defendant had departed herself or remained away from him without any reasonable cause and against his will, Davey v. Davey, 283 Ill. App. 458. It is also the law that if parties live apart by mutual agreement and so living apart, there is no such legal desertion on the part of either as constitutes ground for divorce, Lyons v. Lyons, 237 Ill. App. 580. Where the complainant in a divorce proceeding has, either expressly or impliedly, consented to the original separation or its continuance and has not revoked such consent, he is not entitled to a divorce for desertion, 19 Corpus Juris, p. 34, sec. 120; and if such appears in defense, it is a bar to the action."

The allegations of the counter claim are not sustained by the evidence and the chancellor properly dismissed it. Neither are the allegations of the original complaint sustained by the evidence and the decree must therefore be reversed.

Decree reversed.

O.K
HOB

Abstract

A

Gen. No. 10251 Agenda No. 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1948

WALTER H. BRUBAKER and SUSIE BRUBAKER Plaintiffs-Appellees vs GEORGE HATJIMANOLIS and HELEN HATJIMANOLIS Defendants-Appellants	331 I.A. 288[3] APPEAL FROM THE CIRCUIT COURT OF STEPHENSON COUNTY

Per Curiam:

On July 31, 1946 Walter H. Brubaker and wife, Susie Brubaker filed their complaint in the circuit court of Stephenson County alleging that on May 22, 1935 they were in debt to George Hatjimanolis in the sum of $6800.00 and that to secure the payment of the same with 5% interest thereon they conveyed to him certain described premises in Silver Creek Township, Stephenson County; that the deed of conveyance so executed by them, altho appearing to be absolute on it's face was not intended as such by the parties thereto but it was understood that the premises therein described were to be held by the grantee therein named simply as security for the payment of

Per Curiam:

-1-

said sum of money and interest thereon; that at the same time the deed was delivered certain other papers were executed by the plaintiffs, the exact nature of which is unknown to the plaintiffs; that the plaintiffs remained in possession of said premises from and after the execution of said deed and were in possession thereof at the time of the filing of the complaint and that during this period of time they made various enumerated improvements, paid the taxes legally assessed thereon, kept the buildings thereon insured and had paid the interest due on said $6800.00 until February 21, 1946. It was further alleged that on May 21, 1946 the plaintiffs had tendered to the defendant, George Hatjimanolis, additional interest which he, this defendant, refused to accept.

Attached to the complaint was a copy of a warranty deed dated May 22, 1935, executed by plaintiffs which conveyed to George Hatjimanolis the premises described in the complaint. The prayer of the complaint was that an account be taken and upon the taking of such account, under the direction of the court, if the plaintiffs should be found to be indebted to the defendant, George Hatjimanolis, for principal or interest, that the plaintiff, Walter H. Brubaker, offered to pay the amount so found due and upon that being done the defendants be decreed to reconvey the premises to the plaintiffs by a sufficient deed of conveyance. There was also a prayer for such other and further relief as equity may require.

The answer of the defendants admitted the execution of the deed of conveyance by the plaintiffs and the execution

said sum of money and interest thereon; that at the same time the deed was delivered certain other papers were executed by the defendants, the exact nature of which is unknown to the plaintiffs; that the plaintiffs relied in reasonable on said promises from and after the execution of said deed and were in possession thereof at the time of the filing of the complaint and that during this period of time they made various unspecified improvements, paid the taxes legally assessed thereon, held the building thereon insured and had paid the interest due on said $6000.00 until February 21, 1926. It was further alleged that on May 21, 1926 the defendants had trespassed on the premises, damage occasioned, additional interest owing by said mortgagors, release or change.

Attached to the complaint was a copy of a warranty deed dated May 21, 1923, executed by plaintiffs which purported to convey the premises in-volved in the controversy. The terms of the complaint was that on payment to them and upon the failing of such account, under the direction of the court, to the defendants should be found to be indebted to the defendants, George Dwyhanoils, for physical or injuries, that the plaintiff, Walter E. Prudhomme, offered to pay the amount so found due and upon that notice from the defendants be decreed to reconvey the premises to the plaintiffs by a sufficient deed of con-veyance. There was also a prayer for such other and further relief as equity may require.

The answer of the defendants admitted the execution of the deed of conveyance by the plaintiffs and the execution

at the same time of other papers but denied that the nature of these other papers was unknown to plaintiffs. The answer admitted that plaintiffs remained in possession of the premises and made improvements thereon after the execution of the deed and alleged that at the time of the execution of the deed of conveyance plaintiffs and the defendant, George Hatjimanolis, entered into a written agreement whereby George Hatjimanolis agreed to convey to plaintiffs the premises involved herein upon the payment of $6800.00 five years from date, with 5% interest payable quarterly. The answer then alleged that the plaintiffs failed to perform the terms of this agreement and on May 22, 1940 the defendant, George Hatjimanolis, elected to terminate the same and so notified the plaintiffs; that thereupon the plaintiffs surrendered their copy of the contract stating that they were unable to perform and subsequently defendants agreed orally with the plaintiffs that they could remain in possession of the premises upon payment of $25.00 cash rent per month plus taxes. The answer then avers that the plaintiffs have defaulted in their rental payments and are in arrears in the sum of $225.00. The answer prays that the relief sought by the plaintiffs be denied and that the defendants be decreed to be the owners of said premises, free of all liens or encumbrances and that an accounting be had to determine the rental due defendants from the plaintiffs and that the plaintiffs be required to deliver up possession of said premises by a day certain to be fixed by the court.

At the same time of other papers had denied that the
nature of these other papers was unknown to plaintiff.
The answer admitted that plaintiff remained in possession
of the premises and made improvements thereon after the
execution of the deed and alleged that at the time of the
execution of the deed of conveyance plaintiff and the
defendant, George Bellimonte, entered into a written
agreement whereby George Bellimonte agreed to convey to
plaintiff the premises involved herein upon the payment
of $800.00 five years from date, with 6% interest payable
quarterly. The answer then alleged that the plaintiff
failed to perform the terms of the agreement and on the 20th
day the defendant, George Bellimonte, elected to terminate
the same and so notified the plaintiff, that thereupon
the plaintiffs surrendered their copy of the contract
stating that they were unable to perform and subsequently
defendants agreed verbally with the plaintiffs that they
would remain in possession of the premises upon payment
of $40.00 cash rent per month plus taxes. The answer then
avers that the plaintiffs have defaulted in their rental
payments and are in arrears in the sum of $240.00. The
answer prays that the relief sought by the plaintiffs be
denied and that the defendants be decreed to be the owners
of said premises, free of all liens or encumbrances
and that no accounting be had to determine the rental due
defendants from the plaintiffs and that the plaintiffs
be required to deliver up possession of said premises by a
day certain to be fixed by the court.

Attached to the answer is a copy of an agreement dated May 22, 1935 and executed by the plaintiffs and the defendant, George Hatjimanolis. By this agreement plaintiff covenanted and agreed to pay George Hatjimanolis $6800.00 five years after date with 5% interest payable quarterly and to pay all taxes legally levied upon the premises therein described after 1933 and ~~xxxxxxxxxxxxxxxxxx~~ to carry insurance upon the buildings. In consideration of this being done the defendant, George Hatjimanolis, covenanted and agreed to convey to the plaintiffs the described premises by warranty deed.

To this answer plaintiffs replied and by their reply denied they ever received a copy of these articles of agreement for a deed, stated that they believed they were executing a trust deed at the time the agreement for a deed was executed and aver they did not know the exact nature of the papers which they did execute and call for strict proof of the alleged contract. By their reply they deny they ever received any notice of any forfeiture of any contract, in writing or otherwise, deny they ever surrendered a copy thereof to any one and aver that to the best of their knowledge and belief they were never in possession of any such contract. They deny that they ever entered into any oral agreement about remaining on the premises and paying rent and aver that they have, from time to time, applied to George Hatjimanolis to make out new papers and extend their mortgage loan but were always informed by this defendant that no new papers were necessary.

After the issues had been thus made up the cause

Attached to the answer is a copy of an agreement dated May 19, 1925 made between by the plaintiffs and the defendant, George Hellenbrecht. By this agreement defendant covenanted and agreed to pay George Hellenbrecht $800.00 five years after date with 6% interest payable quarterly and to pay all taxes legally levied upon the premises

Herein described after 1925 and ~~xxxxxxxxxxxxxxxxxxxxxxxx~~ to carry insurance upon the buildings. In consideration of this being done the defendant, George Hellenbrecht, covenanted and agreed to convey to the plaintiffs the premises described by warranty deed.

In this answer plaintiffs replied and by their reply denied that they ever received a copy of those provisions of agreement for a deed, stated that they believed they were executing a trust deed as per form the agreement for a deed was executed and after they had by their own mistake of the papers which they had received and such was actual proof of the alleged contract. In their reply they deny that ever received any notice of any violation of any contract, in writing or otherwise, and that they never acquiesced a copy thereof in any manner and were kept in the dark of their knowledge and belief they were never in possession of any such contract. They deny that they ever entered into any oral agreement about remaining in the premises and paying rent and ever that they have, from time to time, applied to George Hellenbrecht to make out new papers and extend their mortgage loan but were always informed by his secretary that he was gone more permanently.

After the papers had been from hand to the same

was referred to the Master in Chancery who took the evidence and made his report finding that the deed and contract had been executed as set forth in the pleadings. The Master further found that the plaintiffs had failed to prove their case by a preponderance of the evidence and also found that the defendants had not established the termination of the contract of purchase. The Master recommended that the complaint be dismissed. To these findings the defendants filed objections and to all adverse findings of the Master the plaintiffs also filed objections. The Master overruled all objections and the respective parties filed their motions that their objections to the Master's report stand as exceptions thereto upon the hearing of the cause before the Chancellor.

With the record in this condition plaintiffs moved and were granted leave to file a further amendment to their complaint. By this amendment they attached to their complaint as so amended a copy of the said agreement of May 22, 1935 executed by the plaintiffs and defendant, George Hatjimanolis, and alleged that about the time this contract matured they offered to execute a new contract but were assured by defendants that no new papers were necessary; that they had been in default in the payment of interest from time to time but defendants always waived said defaults and accepted the payments of interest. By this further amendment the plaintiffs aver that they have tendered interest to the defendants up to August 22, 1946 but defendant, George Hatjimanolis, has refused said tender;

was referred to the master in chancery who found the evidence and made his report finding that the deed and mortgage had been executed as set forth in the pleadings. The master further found that the plaintiffs had failed to prove their case by a preponderance of the evidence and also found that the defendants had not established the invalidation of the contract of mortgage. The master recommended that the complaint be dismissed. To these findings the defendants filed objections and by all answers findings of the master the plaintiffs also filed objections. The master overruled all objections and the respective parties filed briefs noting that their objections to the master's report raised no questions whatever upon the merits of the cause before the Chancellor.

With the record in this condition the plaintiffs moved and were granted leave to file a further memorandum to their complaint. In this memorandum they attempted to cure deficiencies in an amended a copy of the said agreement of May 26, 1925 covering by the plaintiffs and defendants, George Bullimmelle, the allegations that upon the time this contract matured they offered to execute a new mortgage but were assured by defendants that no new mortgage was necessary; that they had been in default in the payment of interest from time to time but defendants always waived said defaults and accepted the payments of interest. By this further amendment the plaintiffs have that they have tendered interest to the defendants up to August 15, 1929 but defendant, George Bullimmelle, has refused said tender;

that plaintiffs have been and are now ready, willing and able to complete said contract of purchase on their part and have made valuable improvements upon said premises; that defendant, George Hatjimanolis, has refused to perform the agreements upon his part to be performed and has failed and refuses to recognize any rights of the plaintiff under the contract. The prayer of the complaint as so amended was that an accounting be had and that defendant, George Hatjimanolis be directed to execute and deliver to plaintiffs a good and sufficient deed to the premises in accordance with the contract, upon payment to him of the amount so found due him by the court.

The answer of the defendants to this amendment admitted the execution of the written agreement of May 22, 1935 and admitted that the plaintiffs were in default in payment of interest from time to time but denies that those defaults were for short periods of time and denied that defendants ever waived any defaults. The defendants admitted that plaintiffs tendered interest up to August 22, 1946 and state that the reason they refused to accept the same was that the contract had been forfeited and determined on or about May 22, 1940. The defendants averred that plaintiffs were permitted to remain upon the premises in spite of their default, only upon condition that they should pay $25.00 per month rental for the premises and charge that any rights of the plaintiffs under said contract have long since ceased. As a separate affirmative defense defendants averred that all the rights of the plaintiffs under the contract have ceased and determined, that all payments

that plaintiffs have been and are now ready, willing and able to complete said contract of purchase on their part and have made tender thereof and said defendant;

that defendant, George Dellimuzio, has refused to perform the agreement upon his part to be performed and has failed and refused to recognize the rights of the plaintiff under the contract. The prayer of the plaintiff is as follows and that an accounting be had and that defendant, George Dellimuzio be compelled to execute and deliver to plaintiffs a good and sufficient deed in the premises in compliance with the contract, upon payment to him of the amount so found due him by the court.

The answer of the defendant by way demurrer admitted the execution of the written agreement of Mar 12, 1948 and admitted that the plaintiffs were ready to deliver to purchaser at interest from time to time our deposit receipts relative were for short periods of time and denied that defendants ever waived any defaults. The defendants admitted that plaintiffs tendered interest up to January 12, 1949 and state that the reason they refused to accept the same was that the contract had been forfeited and determined on or about May 12, 1949. The defendants averred that plaintiffs were prevented to remain upon the premises in spite of their default, only upon condition that they should pay $4,000 per month rental for the premises and stated that any rights of the plaintiffs under said contract have long since passed. As a separate affirmative defense defendants averred that all the terms of the plaintiffs under the contract have ceased and determined, that all payments

owing by the plaintiffs to the defendants are payments for rental of the premises and defendants prayed that the relief sought by the plaintiffs be denied, that the defendants be decreed to be the owners of said premises in fee simple free of all liens and encumbrances of any kind; that an accounting be had to determine the amount of rental due the defendants from the plaintiffs and that an order be entered requiring the plaintiffs to vacate the premises on a day certain to be fixed by the court.

Thereafter amended exceptions were filed by the defendants to the Master's report and the cause was heard by the Chancellor upon the pleadings, the evidence taken and reported by the Master and the objections and exceptions to the Master's report. The Chancellor rendered a decree finding that on May 22, 1935, the plaintiffs executed a warranty deed conveying to the defendant, George Hatjimanolis, the premises described in the complaint; that at that time the plaintiffs were in possession of said premises and still occupy the same; that at the time of the execution of the deed the defendant, George Hatjimanolis, who was then unmarried, and the plaintiffs entered into a contract for a deed wherein this defendant agreed to convey to the plaintiffs the premises involved herein free and clear of all encumbrances upon the payment to him of $6800.00 five years after the date of the contract with 5% interest payable quarterly; that the plaintiffs paid interest irregularly upon said $6800.00 at the rate of 5% until the year 1939; that during said time they were frequently in arrears; that

thereafter the plaintiffs, from time to time, paid the interest upon the contract to defendant, George Hatjimanolis, at the rate of $75.00 quarterly through and including February 21, 1946 which was accepted by this defendant; that on July 27, 1946 plaintiffs tendered the sum of $75.00 in the form of a cashier's check endorsed to George Hatjimanolis for interest from February 21, 1946 to May 21, 1946 and on August 27, 1946 plaintiffs tendered the further sum of $75.00 for interest from May 21, 1946 to August 21, 1946; that said two tenders were refused by George Hatjimanolis because they were tendered as interest and he refused to accept them except as rent; that on October 24, 1947 plaintiffs tendered in open court the further sum of $300.00 as interest at the rate of $75.00 quarterly for the period from August 21, 1946 to August 21, 1947, which amount is on deposit with the circuit clerk; that plaintiffs paid all the taxes on the premises as provided by the contract for the year 1933 until the last half of the year 1945 which were payable September 1, 1946 which was subsequent to the institution of this suit; that the taxes for the last half of 1945 and all the 1946 taxes were paid by George Hatjimanolis prior to the time they were due; that this defendant, never prior to the institution of this suit demanded possession of the premises from the plaintiffs and never instituted any legal proceedings to oust the plaintiffs from possession of said premises and never instituted any legal proceedings to enforce any forfeiture of the terms of said contract of May 22, 1935; that this defendant never

thereafter the plaintiff, from time to time, paid the interest upon the mortgage to defendant, Lucie Hollingsworth, at the rate of $75.00 quarterly through and including February 15, 1942 which was accepted by said defendant; that on July 27, 1942 plaintiffs tendered the sum of $75.00 in the form of a cashier's check endorsed to Lucie Hollingsworth for interest from February 15, 1942 to May 15, 1942 and on August 27, 1942 plaintiffs tendered the further sum of $75.00 for interest from May 15, 1942 to August 15, 1942; both said checks were refused by Lucie Hollingsworth because they were tendered as interest and he refused to accept them except on condition; that on October 26, 1947 plaintiffs tendered in cash to defendant the further sum of $225.00 as interest at the rate of $75.00 quarterly for the period from August 15, 1942 to August 15, 1947, which tender is on deposit with the circuit clerk; that plaintiffs paid all the taxes on the premises as provided by the mortgage for the year 1939 until the last half of the year 1942 which were payable September 1, 1943 which was subsequent to the institution of this suit; that the taxes for the last half of 1942 and all the 1943 taxes were paid by Lucie Hollingsworth prior to the time they were due; that the defendant, never prior to the institution of this suit demanded possession of the premises from the plaintiffs and never instituted any legal proceedings to oust the plaintiffs from possession of said premises and never instituted any legal proceedings to enforce any forfeiture of the terms of said contract of May 15, 1939; that said defendant never

tendered a deed to the plaintiffs nor did the plaintiffs on May 22, 1940 tender the purchase price to this defendant; that the plaintiffs made improvements upon said premises during the period from May 22, 1935 to the inception of this suit; that defendant, George Hatjimanolis, has refused to convey the premises to the plaintiffs claiming that the plaintiffs have no interest therein either as purchasers or mortgagors; that plaintiffs carried insurance on the premises from 1935 to 1939 and from 1945 to the inception of this suit with loss payable clauses to George Hatjimanolis; that plaintiffs are ready and willing to comply with the terms of this contract for deed; that defendants indulged plaintiffs from time to time in making of payments of interest and principal on said contract and the court finds said contract is still in full force and effect and that defendant, George Hatjimanolis failed to prove any notice of forfeiture and plaintiffs failed to prove that the warranty deed given by them on May 22, 1935 was intended as a mortgage.

The court then found that there remained due on the principal of the contract between the plaintiffs and the defendant, George Hatjimanolis, the sum of $5250.00 and in addition interest on said account at the rate of $75.00 quarterly from and after February 21, 1946 and decreed that the contract for deed entered into by the plaintiffs and the defendant, George Hatjimanolis, and dated May 22, 1935 and duly proven in this cause, be specifically performed. The decree ordered the defendant,

George Hatjimanolis to execute and deliver to the plaintiffs a warranty deed conveying to them free and clear of all encumbrance, in fee, the premises described in said contract and in said decree, said deed to be approved by the Master in Chancery and provided that plaintiffs within ten days from the date of the decree tender to the clerk of the Circuit Court $5250.00 and interest as specified to the date of payment. The decree then provided that in event George Hatjimanolis does not, within twenty days after the payment of said sum to the clerk, tender or deliver a deed to the plaintiffs, that then the Master is directed to execute said deed in the name and stead of the said defendant, George Hatjimanolis. The decree also provided that in the event the plaintiffs do not pay the amount found to be due as in the decree provided that then they shall forfeit their rights under the contract and defendant, George Hatjimanolis, shall have the right to immediate possession of said premises and also a writ of assistance to enforce the same.

To reverse this decree the defendants have prosecuted an appeal to this court. The record discloses that the decree was entered on December 10, 1947 and that on December 19, 1947, prior to the expiration of the ten days as provided in said decree, the plaintiffs paid to the clerk of the Circuit Court for the use of the defendant, George Hatjimanolis, the sum of $5886.06, being principal and interest in full to December 19, 1947 as provided by said decree and received from the clerk a receipt therefor.

In the brief of counsel for appellants the state-

ment is made that where the form of decree gives the plaintiffs the option of paying a certain amount of money within a given length of time in return for which a defendant is required to execute a deed, a freehold is not directly involved and therefore in the instant case, this court has jurisdiction of the appeal. Several cases are cited in support of this proposition but the question of jurisdiction is not argued. Counsel for appellees made no motion to transfer this cause to the Supreme Court but state that a freehold is involved and call our attention to the cases of Lewis v. McCreedy, 378 Ill. 264; Lapkins v. Konen, 392 Ill. 400; Powell v. Huey, 241 Ill. 133 and Eich v. Czervonko, 330 Ill. 455.

A freehold is involved within the meaning of the constitution and statute where the decree results in one party gaining and the other losing a freehold estate or where the title to a freehold is so put in issue by the pleadings that the determination of the case necessarily involves a decision with respect to the ownership of the real estate altho the decree does not result in one party gaining and the other losing the estate. (Swinson v. Sodaman, 369 Ill. 442; Sanford v. Kane, 127 Ill. 591). In the Sanford case the court said that bills to foreclose mortgages, or to establish other liens or to redeem where the right to redeem is the only question litigated, do not ordinarily involve freeholds because by payment of the money necessary to discharge the lien, execution of the decree which may divest one of the parties of his freehold, is prevented. The Swinson case was a suit to have a deed declared a mortgage and to redeem from it. The Chancellor rendered a decree in favor of the plaintiff and the de-

fendant appealed to the Supreme Court. That court transferred the cause to this court and in the course of it's opinion said: (p. 446) "In determining whether a freehold is involved it is immaterial which way the trial court decided the issue (citing cases). A decree in favor of a party claiming a right of redemption merely establishes his right to redeem, of which he may or may not elect to avail himself. (Citing cases). Here the challenged decree ordered a conveyance of defendant's interest in the farm to plaintiff provided he paid her a specified sum of money within a designated time. On the other hand, if he did not pay within the prescribed period, his complaint, it was adjudged, should stand dismissed for the want of equity. The gain or loss of a freehold, it follows, would not be the necessary result of the decree rendered but would depend upon the subsequent act or inaction of the plaintiff. (Citing cases)."

In the instant case the complaint as finally amended and upon which relief was granted was a complaint for the specific performance of a written contract. The answer of the defendant alleged a breach of that contract by the plaintiff and a forfeiture thereof by the defendant. The decree found the issues for the plaintiffs and specifically enforced the provisions of the contract, and directed the conveyance of the premises upon the payment of a specified sum which was found due from the plaintiffs to the defendant under the contract. The complaint offered and tendered this amount to the defendant and the record shows the plaintiffs made good their tender and deposited with the Clerk of the court for the use of the defendant,

[illegible]

within the time specified in the decree, the amount, so found due the defendant under the contract.

In Robnett v. Miller, 303 Ill. 515 it appeared that in 1905 James M. Robnett, who was the owner of certain lots in Centralia conveyed them to A. H. Young. On April 2, 1907 Young conveyed them to Isaac O. Hester and on the same day Hester entered into a contract with Robnett in which Hester agreed that he would convey these lots to Robnett for $1500.00 and Robnett agreed to pay that amount together with taxes. In 1913 Robnett conveyed two of the lots to his son. On May 22, 1920 Hester conveyed some of the lots to B. M. English and F. B. Miller the deed to them stating that it was subject to the contract of April 2, 1907 between Hester and Robnett. In September 1920, Robnett and others filed their bill to have the deed from Young to Hester declared a mortgage. The defendants answered denying that the deed was a mortgage and filed a cross-bill asking that the contract of April 2, 1907 be declared forfeited and that the deed of 1913 from Robnett to his son might be cancelled. Upon a hearing, the original bill as amended, was dismissed and a decree rendered granting the relief sought by the cross-bill. In affirming this decree the Supreme Court said: (p.518) "Counsel for defendants in error argue that this court does not have jurisdiction of this case but that it should have been taken to the Appellate Court, as no freehold is involved. This court has held that a freehold is involved, 'within the sense of the constitution and statute, only in cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold

within the time specified in the decree, the amount, so found due the defendant under the contract.

In Roberts v. Miller, 207 Ill. 213 it appeared that in 1900 James M. Roberts, who was the owner of certain lots in Centralia conveyed them to A. H. Young. On April 2, 1907 Young conveyed them to Isaac T. Hester and on the same day Hester entered into a contract with Roberts in which Hester agreed that he would convey these lots to Roberts for $1500.00 and Roberts agreed to pay that amount together with taxes. In 1910 Roberts conveyed two of the lots to his son. On May 22, 1910 Hester conveyed some of the lots to T. M. English and F. P. Miller the deed to them stating that it was subject to the contract of April 2, 1907 between Hester and Roberts. In September 1910, Roberts and others filed their bill to have the deed from Young to Hester declared a mortgage. The defendants answered denying that the deed was a mortgage and filed a cross-bill asking that the contract of April 2, 1907 be declared forfeited and that the deed of 1910 from Roberts to his son might be cancelled. Upon a hearing, the original bill is dismissed, the cross-bill and a decree rendered granting the relief sought by the cross-bill. In affirming this decree the Supreme Court said: (p.218) "Counsel for defendants in error argue that this court does not have jurisdiction of this case but that it should have been taken to the Appellate Court, as no freehold is involved. This court has held that a freehold is involved, 'within the sense of the constitution and statute, only in cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold

estate, or when the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue.' (Prouty v. Moss, 188 Ill. 84; [redacted] Malaer v. Hudgens, 130 id. 225; Sanford v. Kane, 127 id. 591). In case the decree of the circuit court should be reversed in this proceeding Miller and English would lose a freehold and Robnett and his son would gain such a freehold. The writ of error was properly sued out direct to this court."

Lewis v. McCreedy, 378 Ill. 264, was a suit for specific performance of a contract of sale of land. A decree of specific performance was entered by the Circuit Court and the defendants appealed. The court stated that a freehold was involved and cited Powell v. Huey, 241 Ill. 132 and Eich v. Czervonko, 330 Ill. 445. In answer to the contention that the tender of the purchase money was not sufficient the court said, (p.271) that the general rule is, that to entitle a purchaser to demand a deed and maintain a bill for specific performance, it is sufficient that he is ready and offers to pay any sum that may be found to be due and still unpaid and to comply with the contract on his part and that this rule is particularly applicable in cases involving unsettled accounts between the parties and that under those circumstances it is sufficient for the purchaser to show a willingness and ability to pay such amounts as may be found to be due upon an accounting.

Miller v. Pettengill, 392 Ill. 117 was a suit to quiet title. The complaint alleged that the defendants unlawfully claimed a right to purchase the land involved by virtue of a contract of sale and that this contract constituted a cloud upon plaintiff's title. The assignee of this contract

estate, or when the title is as yet in doubt by the pleadings that the decision of the case necessarily involves a decision of such issue." (Prouty v. Ross, 126 Ill. 64; [redacted] Malone v. Hudgens, 150 Ga. 825; Sanford v. Kane, 147 Ga. 491). In such case the decree of the circuit court should be reversed in this proceeding. Miller and English would have a freehold and Roberts and his son would have such a freehold. The suit of error was properly sued out direct to this court.

Lewis v. McCreedy, 275 Ill. 221, was a suit for specific performance of a contract of sale of land. A decree of specific performance was entered by the trial court and the defendants appealed. The court ruled that a freehold was involved and cited Prouty v. Ross, 126 Ill. 124; Ann v. Severance, 230 Ill. 142. In speaking of the contention that the tender of the purchase money was not sufficient the court said (p. 271) that the general rule is, that if suits a purchaser to demand a deed and maintain a bill for specific performance, it is sufficient that he is ready and offers to pay any sum that may be found to be due and still insists and is willing to comply with the contract on his part and that this rule is particularly applicable in cases involving unliquidated accounts between the parties and that under those circumstances it is sufficient for the purchaser to show a willingness and ability to pay such amounts as may be found to be due upon an accounting.

Miller v. Tattenhall, 292 Ill. 117 was a suit to quiet title. The complaint alleged that the defendants unlawfully claimed a right to purchase the land involved by virtue of a contract of sale and that this contract constituted a cloud upon plaintiff's title. The assignee of this contract

intervened and filed a counter-claim for specific performance of the contract. The Chancellor found the allegations of the counter-claim to be true, decreed specific performance and directed the assignee to pay the plaintiff the purchase price, $11,000.00, upon the tender and delivery of the deed and a direct appeal was prosecuted to the Supreme Court resulting in the decree of the circuit court being affirmed.

At the time of the institution of this proceeding appellant, George Hatjimanolis, was the record owner of the title to the premises involved herein. If the decree of the chancellor is affirmed the result thereof will be that appellant, George Hatjimanolis will lose the title to the freehold and appellees will gain title thereto. If, however, the decree of the lower court is reversed, the result thereof will be that the contract which appellees seek to specifically enforce must be held to have been forfeited or unenforcable and that appellees have no rights under that contract and the title to the freehold will remain in George Hatjimanolis.

The issues made by the pleadings requires a determination whether the contract of sale executed by the parties in 1932 has or has not been forfeited. If it has not been forfeited and if appellees are entitled to have it specifically enforced as decreed by the Chancellor, then, appellant, George Hatjimanolis, will lose a freehold. Appellants insist that the contract has been forfeited and that George Hatjimanolis is the absolute owner of the freehold. Appellees insist that the written contract of 1932 has not been forfeited and is

intervened and filed a counter-claim for specific performance of the contract. The Chancellor found the allegations of the counter-claim to be true, decreed specific performance and directed the assignee to pay the plaintiff the purchase price, $11,000.00, upon the tender and delivery of the deed and a direct appeal was prosecuted to the Supreme Court resulting in the decree of the circuit court being affirmed.

At the time of the institution of this proceeding appellant, George Hatjimanolis, was the record owner of the title to the premises involved herein. If the decree of the chancellor is affirmed the result thereof will be that appellant, George Hatjimanolis will lose the title to the freehold and appellees will gain title thereto. If, however, the decree of the lower court is reversed, the result thereof will be that the contract which appellees seek to specifically enforce must be held to have been forfeited or unenforceable and that appellees have no rights under that contract and the title to the freehold will remain in George Hatjimanolis.

The issues made by the pleadings required a determination whether the contract of sale executed by the parties in 1959 has or has not been forfeited. If it has not been forfeited and if appellees are entitled to have it specifically enforced as decreed by the Chancellor, then, appellant, George Hatjimanolis, will lose a freehold. Appellees insist that the contract has been forfeited and that George Hatjimanolis is the absolute owner of the freehold. Appellees insist that the written contract of 1959 has not been forfeited and is

valid and seek to have it's provisions specially enforced and a conveyance made by the seller pursuant to the terms of the contract. A freehold is necessarily involved in this appeal.

The court not having jurisdiction of the issues involved in this appeal, this cause is transferred to the Supreme Court.

Cause transferred.

44503

ELAINE LOVELLETTE and JAMES LOVELLETTE, Appellants,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation, and CHARLES E. JOERN and ELEANOR L. JOERN, his wife, Appellees.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued at law to recover damages for the alleged breach of a written contract entered into between them and the defendants Charles E. Joern and Eleanor L. Joern for the purchase by plaintiffs of a house in La Grange to be constructed by the defendants, the Joerns. The breaches claimed are that the Joerns did not deliver possession of the building at the time required by the contract and that portions of the work were defective. In the same suit plaintiffs also sought to recover damages against the defendant First Federal Savings and Loan Association, from which plaintiffs borrowed a portion of the purchase price for the property and as security executed a mortgage to the loan association. It is alleged in the complaint that the loan association has not properly accounted for the funds in its possession with respect to $2279.50 of various funds received by the association, constituting, as plaintiffs allege, conversion of said monies. At the close of plaintiffs' case the court granted defendants' motions for a directed verdict, and entered judgment in favor of defendants, from which plaintiffs appeal.

It appears from the evidence that plaintiffs had sold to Harry Owen, Sr., their farm and home located south of Downers Grove in December 1941, and received a $14,000.00 mortgage as part payment. They then purchased from defendants Charles E. and Eleanor L. Joern a lot and building which was in the process of construction. The purchase price was $23,000.00, payable $5000.00 at the time of the contract, $4000.00 cash and a $14,000.00 mortgage at the closing of the deal. The $4000.00 cash was to be deposited in escrow on or before January 15, 1942, and the $14,000.00 security was to be either a mortgage for that amount on the Lovellette farm as executed by Harry Owen, the purchaser of the farm, or $14,000.00 on the lot and building obtained by plaintiffs from the defendant loan association. The $5000.00 down payment was made by means of plaintiffs' check to the Joerns dated December 9, 1941. Construction of the house was completed in January 1942. The $4000.00 to be paid on completion of the building was not deposited in escrow but was paid by plaintiffs to the Joerns by check dated January 14, 1942, certified by the First National Bank on March 4, 1942. It is conceded by plaintiffs that they paid $4000.00 to the sellers and obtained the $14,000.00 mortgage from the loan association. The $14,000.00 proceeds from the mortgage were not enough to pay for all labor and materials, and under date of March 13, 1942 the loan association wrote plaintiffs that they had received the sworn contractor's statement in the amount of $20,031.66, waivers of lien totalling $5627.20 and checks totalling $2683.96 from William Joern and Sons, the

contractors, and further advising that the amount of $14,404.46 held on deposit in the Loans-in-Process account for the purpose of paying the balance due for construction costs would be disbursed in accordance with the sworn construction statement only upon receipt of full waivers of lien for all labor and materials used in construction of the building. The evidence discloses that the orders for payment were signed both by the contractor and Mrs. Lovellette authorizing the loan association to pay out the money, and that the latter secured a waiver of lien on each payment which they made.

With respect to the claimed conversion, it is conceded that the loan association accounted for $14,404.46. There is nothing in plaintiffs' evidence to indicate that it received any other or greater sum from the Lovellettes. All other funds received by the loan association for disbursement were obtained not from plaintiffs but represented a deposit from the firm of William Joern and Sons, the general contractor. This deposit was to make certain that no mechanic's lien would be filed against the building, and when waivers of lien covering all items of the contractor's statement were received it was intended that this fund should be returned to the builder. The record shows that waivers were received for all items that were properly paid on order of the plaintiffs, and that a full accounting was made. William Joern and Sons are not parties to this suit. On that state of the record we think the court properly directed a verdict in favor of the loan association, since

there was no evidence that it had paid to the Joerns without authorization by plaintiffs any sums of money belonging to or deposited by plaintiffs or that it was guilty of the conversion of any monies whatever.

The gravamen of the claim against the defendants Charles E. Joern and Eleanor L. Joern is that there were material breaches of the written contract by reason of defective construction. The court also directed a verdict in favor of defendants on this phase of the litigation on the theory that plaintiffs had not made a prima facie case. The written contract between the parties provided that all workmanship and materials referred to in the specifications or shown on the drawings attached thereto were to be of the best respective kinds and grade, and all execution was to show first-class workmanship. Plaintiffs introduced considerable evidence with respect to broken sewer tile running from the soil pipe of two bathrooms which caused a leakage in the basement, resulting in considerable water on the basement floor and a bad odor. Plaintiffs' witnesses also testified that the heating plant was not in working order, the temperature in different parts of the building being "uneven"; that there was a considerable bulge in the floor of the living room and dining room, with resultant looseness of the flooring; that a crack appeared in the south garage wall, beginning about one foot under the roof and extending diagonally across the garage window, becoming longer and wider with time so that "you could see daylight through it, if you were inside of the garage"; that there was a

crack in the bedroom downstairs in the southeast corner of the house which at first came down the window of the long wall and eventually came down to the ground, the witness describing it as "clear through to the inside, and the wall paper is cracked underneath the window. *** It is close to quarter of an inch outside and inside"; that there was another crack in the north bedroom upstairs where "the paper was cracked about 2-1/2 or two feet in length and 1/4 of an inch in width. I saw it was cracked on the outside. It started *** under the edge of the roof about 2-1/2 feet and 1/4 wide, the same as on the inside"; that in the south bedroom the window sill was "all gouged," one of the wooden frames holding the glass being "gouged out." There is also evidence of several minor defects. Witnesses testified that these various defects appeared within a short time after plaintiffs took possession. We think this evidence should have been submitted to the jury to determine whether there were such defects in construction, and whether they constituted a breach of the written contract between the parties, and for the assessment of damages, if any. The rule is well settled that on a motion for a directed verdict, "the sole question presented to the court is whether, admitting the evidence in favor of the plaintiff to be true, that evidence, together with all legitimate conclusions and inferences, fairly tends to sustain plaintiff's cause of action." Elbers v. Standard Oil Co., 331 Ill. App. 207, citing Vieceli v. Cummings, 322 Ill. App. 559. Under that rule the court has no authority to pass upon the credibility

of witnesses or to weigh the evidence; these are purely jury functions.

In the view we take, the judgment in favor of First Federal Savings and Loan Association should be affirmed, and it is so ordered; but the judgment in favor of Charles E. and Eleanor L. Joern should be reversed and the cause remanded with directions for a new trial upon the merits, and it is so ordered.

Judgment affirmed in part and reversed in part, and cause remanded with directions.

Sullivan, P. J., and Scanlan, J., concur.

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44225

CHRIS N. POPE, Appellant, v. WALTER L. GREGORY, JAMES B. CASHIN and WILLIAM F. CLARKE, Civil Service Commissioners of the City of Chicago, Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A certiorari proceeding brought by plaintiff, Chris N. Pope, to review the action of the Civil Service Commission of the City of Chicago in ordering his discharge from his position as a patrolman in the classified service of the Department of Police of the City of Chicago. In the trial court, after a motion to strike the complaint for certiorari was denied, defendants filed the record of proceedings in re plaintiff's discharge. Plaintiff made a motion to quash the return of the said Commission. Upon a hearing the trial court entered an order quashing the writ of certiorari and dismissing plaintiff's complaint for certiorari at his costs. Plaintiff appeals.

Plaintiff was a patrolman of the Chicago Police Department in March, 1943, and on March 30, 1943, he was duly served with a copy of written charges that had been filed against him with the Civil Service Commission. These charges and the specifications in support thereof are hereinafter set forth in the Commission's Findings and Decision.

The Commission held a hearing upon the charges on March 31, 1943. Plaintiff was present in person and was represented by an attorney. At the commencement of the pro-

ceedings the charges were read and the witnesses, including plaintiff, were sworn. Thereupon plaintiff's attorney entered a plea of nolo contendere on behalf of plaintiff. The following is the substance of the evidence heard:

William A. Hanrahan testified that he was the acting captain of the 31st Police District; that he knew plaintiff, who was a police officer serving in that District; that on Monday, March 15, 1943, about 8:30 A. M., he arrived at the police station and Lieutenant Brandt, who was on the first watch, from 12:00 at night to 8:00 in the morning, and Sergeant Mark Keane came into his office and reported that Officer Chris N. Pope, who was assigned to duty on North avenue from Central, which is 5600, to Oak Park avenue, which is 6800, could not be found on his post by Sergeant Keane; that Sergeant Keane, who covered that district, had toured the neighborhood from 5600 to 6800 North avenue and was unable to find Officer Chris Pope on his post; that Keane stated that he walked back and forth four or five times on Pope's territory and was unable to locate him; that he finally got a squad car and they went to 2323 North Natchez avenue, which is an engine house; that they walked in and looked around and then went in the back and found Chris Pope asleep on a bench; that they woke him up and asked him what was wrong, and Pope said he was tired and wanted to sleep, and that Keane immediately brought him to the station; that at the station Lieutenant Brandt ordered Pope's revolver taken away from him and made a report in which he stated that Pope was in an intoxicated condition;

that he, the witness, preferred charges against Pope before the trial board; that they took Pope home around 2:30 in the morning; that he was supposed to be on active duty at the time. Upon cross-examination the witness stated that prior to that time there had been no "blame" on Pope's record "on my watch."

Lieutenant Ignatius J. Brandt testified that he was a lieutenant of police in the 31st District and was acquainted with Pope; that Pope was an officer under the command of the witness at the time in question; that on March 15, 1943, at about 2:15 A. M., Sergeant Mark Keane came into the station accompanied by Pope; that Keane told the witness that he had toured the post between the 5600 and 6800 blocks on North avenue and had failed to find Officer Pope; that he finally went to the engine house at 2323 North Natchez and found him asleep in the rear part of the engine house and that be brought him to the station; that Pope was under the influence of liquor and the witness told Keane to take Pope home; that there was an odor of intoxicating liquor from his breath or person at the time; that Pope walked, but was unsteady; that his speech was coherent. The following then occurred: "Mr. Lucey [Corporation counsel representing the Civil Service Commission]: Q. Was he or was he not sober, or would you say he was intoxicated? A. He was intoxicated." The witness further testified, on cross-examination, that he instructed Sergeant Keane to take Pope's revolver away from him. The following then occurred: "Commissioner Cashin: From your experience when you saw him he was drunk? The

Witness: That is right."

Mark F. Keane testified that he was a sergeant of police of the 31st District and knew plaintiff; that on the morning of March 15, 1943, Pope was assigned to duty; that Pope's post was from 5600 North avenue to 6800 North avenue, on the north side of the street, and that he was supposed to patrol his beat from 12:00 o'clock midnight to 8:00 A. M.; that at 1:00 A. M. on March 15 the witness pulled the box at Central and North avenues and started walking west and that when he got as far as 6800 west, that is, Oak Park avenue, which was the extreme west end of Officer Pope's post, he did not find him; that he had not been able to locate him; that as he was standing at Oak Park avenue and North avenue he saw a police squad car and told them to drive him back east on North avenue to see if he could locate Pope; that he got in the car and they made three trips over Pope's beat but were unable to locate him; that he then asked the squad men to drive him over to the fire station located at 2323 North Natchez and that when he arrived at that station he found Pope asleep in the rear of the fire station on a bench about 1:50 A. M.; that they told him in the fire station that Pope was asleep in the rear of the station; that the light was out there and he turned on the light and shook Pope and asked him the reason for leaving his post, and Pope made the remark to the witness, saying, "I want to sleep. Don't bother me." "Q. Was there any odor of liquor from him? A. Yes, sir; there was"; that when he got Pope to his feet he could see that he

had been drinking, and that he told Pope to put on his hat and coat and come with the witness to the station; that Pope was able to walk under his own power without any help, "but he didn't walk exactly steady or straight, but he walked out a fair distance ahead of me"; that "his speech seemed very thick and he kept asking me what was the reason I wanted to take him to the station instead of letting him stay there and sleep"; that when they got to the station he, the witness, explained the matter to Lieutenant Brandt as to where he had found Pope and the condition he was in and what Pope had said to him, and Lieutenant Brandt asked Pope a few questions, and then Lieutenant Brandt stated that Pope was not fit for any further police duty and ordered the witness to take from Pope "all the city property, and also the service revolver, and to take him home in the squad car," and the witness did what he was directed to do; that Pope had not made any statement that he was unable to work; that he said that he was sick, had pain, and went over to the station house and lay down, and that he intended, if he did not get better, to go to the station and get permission to be excused.

Plaintiff, called as a witness on his own behalf, testified that about 10 o'clock of the evening in question, before he went to work, he had about four glasses of beer at his home; that he left the station and walked to his post; that on his way he did not feel so good so he thought he would drop by the fire station located at North Natchez avenue; that he thought he would stay there about an hour

and would then feel better; that about 1:40 A. M. Sergeant Keane came into the fire station where Pope was lying down "in the back" of it, shook him and took him to the station. In answer to a direct question asked by Commissioner Gregory of the Civil Service Commission Pope stated that if an officer feels incapacitated on his beat it is the rule that the officer should go into the station or call them; that he realized now that he had made a grave mistake in not calling and reporting back to his commanding officer; that he has been reclassified and expects to go into the army; that his wife is applying for a position and she feels that she will be able to sustain herself on whatever she gets from him while he is in the army; that he knew, as a policeman, that he should have gone into the station if he was not feeling well; that when he made his pull he could have told the sergeant that he was not feeling well, but that he did not do this; that it was about seven and a half blocks from his post to the fire station, and that from his beat to the police station was about eight blocks; that he had about four glasses of beer at his home before going on duty, and that about twenty minutes after 12 midnight he had two drinks at a tavern located on his post.

At the conclusion of the evidence Commissioner Gregory announced: "We will take this case under advisement."

On April 20, 1943, the Civil Service Commission filed its Findings and Decision, which reads as follows:

"IN THE MATTER OF CHARGES AGAINST CHRIS N. POPE:

"FINDINGS AND DECISION

"And now, the Civil Service Commission of the City of Chicago, having met in Room 208 City Hall, on the 31st day of March, 1943, for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission.

"And upon conclusion of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against Chris N. Pope in due form of law on the 19th day of March, 1943:

"CHARGES

"Sec. 1, viz: Drinking any kind of Intoxicating Liquor while on duty.

"Sec. 2, viz: Intoxication.

"Sec. 3, viz: Conduct Unbecoming a Police Officer or employee of the City of Chicago.

"Sec. 5, viz: Neglect of Duty.

"Sec. 9, viz: Sleeping While on duty.

"Sec. 13, viz: Leaving Post without being regularly relieved.

"SPECIFICATIONS

"It is charged that Chris N. Pope, Star No. 4171, a policeman in the service of the City of Chicago, Department of Police, was, upon March 15, 1943, guilty of drinking intoxicating alcoholic liquors and being intoxicated therefrom, in that upon March 15, 1943 at about 2:10 A.M. the said Chris N. Pope, while on duty in the 31st Police District, City of Chicago, was under the influence of intoxicating alcoholic liquors and by reason of said intoxication he had the odor of alcoholic liquor upon his breath and person, was

incoherent in his speech, was unsteady in his gait and staggered when he walked.

"It is further charged that the said Chris N. Pope was, on March 15, 1943 at about 1:45 A.M. guilty of sleeping while on duty, in that the said Chris N. Pope, while assigned to the first watch, viz: from 12:00 o'clock midnight to 8 A.M. on March 15, 1943, the said Chris N. Pope was found and observed asleep on a bench of the first floor of a building in the City of Chicago, known as 2323 N. Natchez Ave. by Patrol Sergeant Mark F. Keane, Star N. 144, 31st Police District, City of Chicago at about 1:45 A. M., March 15, 1943.

"It is further charged that the said Chris N. Pope was, on March 15, 1943 guilty of neglect of duty in that upon March 15, 1943 at about 1:45 A. M. the said Chris N. Pope failed and neglected to remain on his post and perform the duties required of a policeman in the service of the City of Chicago, Department of Police.

"It is further charged that the said Chris N. Pope on March 15, 1943, was guilty of leaving his post without being regularly relieved in that upon March 15, 1943 when going on duty on the first watch, viz. 12:00 o'clock midnight to 8 A.M. he was assigned at roll call to the north side of North Avenue from Central Avenue to Oak Park Avenue and at about 1:45 A.M. March 15, 1943 the said Chris N. Pope was found and observed asleep at 2323 N. Natchez Avenue, approximately a mile distance from the post he was assigned to travel, by Patrol Sergeant Mark F. Keane, 31st Police District, City of Chicago.

"The Commission further finds that thereafter due notice was served upon the said Chris N. Pope on the 20th day of March, 1943, by delivering a copy of said notice to the said Chris N. Pope, in person, which notice is in words and figures as follows:

"CIVIL SERVICE COMMISSION
"CITY OF CHICAGO

"Chicago, March 19, 1943.

"To: Patrolman Chris N. Pope
"Address - 110 S. Kostner Ave.

"Sir:

"You are hereby notified that charges (a copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Commissioner of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charges in Room 208 City Hall, on the 31st day of March, 1943, at 10:00 o'clock a.m., at which time and place you may appear and be heard in your defense, if you see fit.

"BY ORDER OF THE COMMISSION:

"(signed) J. S. OSBORNE
"SECRETARY

"The Commission further finds that together with said notice a copy of the foregoing charges was duly served upon the said Chris N. Pope, in person, more than five days prior to this investigation; that the said Chris N. Pope appeared in person at this hearing; and was represented by counsel; that he and his counsel were present throughout and participated in the examination of witnesses; that all

the witnesses were duly sworn, and testified; that the said case was thereupon taken under advisement by the Commission.

"The Commission further finds that the said Chris N. Pope on the 15th day of March, 1943, was a Patrolman in the Department of Police of the City of Chicago.

"The Commission further finds that it has jurisdiction over the subject matter herein and of the person of the said Chris N. Pope; and from a consideration of all of the evidence before it, the Commission finds the said Chris N. Pope guilty of the following:

"Conduct unbecoming a police officer; and leaving post without being regularly relieved:

"In that the said Chris N. Pope, Star No. 4171, a policeman in the service of the City of Chicago in the Department of Police, on March 15, 1943 was guilty of conduct unbecoming a police officer of the City of Chicago, and leaving his post without being regularly relieved;

"In that at the said time the said Chris N. Pope was assigned to duty on North Avenue, from 5600 to 6800, on said North Avenue, in said City of Chicago to prevent windows from being smashed in that vicinity; that his hours of duty upon said assignment at said time were from 12:00 midnight to 8:00 in the morning;

"That the said Chris N. Pope at about 1:15 a.m. on said March 15, 1943, while under the influence of intoxicating liquor, left his post of duty without being regularly relieved and without permission and was later at about 2:30 on said morning found asleep in a drunken condition, at a

place approximately a mile distant from the said post to which he was assigned to travel, and while he was supposed to be on duty;

"That the said Chris N. Pope is irresponsible and is not a fit person to be upon the police force of the City of Chicago;

"Therefore, because of the findings of facts and guilt herein, there is just cause for the removal of the said Chris N. Pope from his said employment in said Police Department of the City of Chicago, and it is, therefore,

"ORDERED, That the said Chris N. Pope be and he is hereby ordered to be and he is hereby discharged from his said position in the said Police Department of the City of Chicago, and from the service of the City of Chicago.

"(signed) WALTER L. GREGORY

"(signed) JAMES B. CASHIN
"Civil Service Commissioners

"Chicago, April 20, 1943.
"Taken under advisement March 31, 1943.
"Commissioners:
"Walter L. Gregory
"James B. Cashin"

Plaintiff contends that "the jurisdiction of the Civil Service Commission was exhausted by its direction of reinstatement on April 12, 1943 and its subsequent proceedings were void and without jurisdiction." This contention is based upon the following letter, sent by the Commission to the Commissioner of Police, City of Chicago:

"April 12, 1943.

"Honorable James P. Allman,
"Commissioner of Police,
"City of Chicago.

"Dear Sir:

"Relative to the cases of -

Oscar Aaflei, patrolman, 29th dist., F95138;

Chris N. Pope, patrolman 31st dist., F96399,

both of which are under advisement, it is the recommendation of the Commission that the said Oscar Aaflei and Chris N. Pope be reinstated pending a decision in their cases. [Italics ours.]

"Please have their respective Captains furnish the Commission with a monthly report as to their conduct.

"In the case of Oscar Aaflei, the Commission requests a medical report as to his condition.

"Yours very truly,

"Secretary"

Plaintiff argues "that on April 12, 1943 the Civil Service Commission, in the exercise of its discretion, made its decision that the plaintiff was not guilty of any cause for removal from the classified service of the Police Department and should be reinstated. The order of reinstatement of April 12, 1943 at the direction of the Civil Service Commission was in effect a finding of not guilty, or insufficient evidence for removal. If on April 12, 1943 the Civil Service Commission felt that the plaintiff had been shown to be guilty of some substantial shortcoming rendering his retention detrimental to the public service, it would have ordered his discharge and not his reinstatement. In fact, if such were the opinion of the Commission it would have been remiss in its duty in directing the reinstatement of the plaintiff. It is manifest, therefore, that the Commission had concluded on April 12, 1943 that the plaintiff was

not guilty of any acts rendering his reinstatement improper. After its decision of April 12, 1943, the jurisdiction of the Civil Service Commission was exhausted," and that its subsequent findings of April 20, 1943, were outside the limits of the jurisdiction of the Commission, as they were matters subsequent to the effective termination of the case. We will endeavor to follow the arguments advanced by plaintiff in support of his position: Plaintiff states that while on its face the letter of April 12, 1943, purports to be a recommendation of the Commission, the term "recommendation" was merely a polite term adopted by the Commission in making its order, and that the letter must be construed as an order of the Commission to the Commissioner of Police. However, in his motion to quash the record of the proceedings of the Civil Service Commission plaintiff stated "that on April 12, 1943 the Civil Service Commission in a letter addressed to the Commissioner of Police <u>recommended</u> the reinstatement of the plaintiff." Plaintiff disposes of the important words, "pending a decision in their cases," in the following manner: That if the said words are taken in their literal sense, the "order" would amount to a reinstatement of plaintiff "on probation," and that as the Commission is without jurisdiction, power or authority to reinstate an employee on probation the words, "pending a decision in their cases," are without force, and ineffectual; that while the Commission has no power to remove, appoint or reinstate an employee to his position, it has the power to order the removal or reinstatement of an employee; that the

letter of April 12, 1943, must be interpreted as an "order" by the Commission to the Commissioner of Police to reinstate plaintiff without qualification. The letter plainly states that the case against plaintiff is under advisement and that the Commission recommends the reinstatement of plaintiff pending a decision in his case, but plaintiff disposes of these important words - indeed, he terminates the entire case then pending against him - in the following manner: He assumes that the letter of April 12, 1943, was an "order" by the Commission to reinstate him without qualification and insists that said order "was in effect a finding of not guilty," and that therefore the Commission, when it wrote the letter, lost jurisdiction of the proceeding which had been brought against him. It is difficult for us to believe that the absurd arguments advanced in support of the instant contention are seriously made. The letter of April 12, 1943, is before us, and it plainly states that the charges against Pope are under advisement and that the Commission recommends that Pope be reinstated pending a decision in the case. Plaintiff's arguments are not based upon the real letter, but upon an imaginary letter conjured up by his counsel. Counsel for the Commissioners agree with plaintiff's statement of the law that the Commission has not the power to remove, appoint or reinstate an employee to his position. They contend that the Commission, by the letter of April 12, did not reinstate plaintiff to his position; that it merely recommended to the Commissioner of Police that plaintiff be reinstated pending a decision in his case; but that even

if the letter could be treated as an order to reinstate pending a decision in the case against plaintiff, such an order would be a nullity and would have no effect upon the jurisdiction of the Commission in the matter of the charges against plaintiff. In the letter the Commission plainly indicated that it was retaining jurisdiction of the charges against plaintiff until it had rendered its final decision, and the Findings and Decision of the Commission shows conclusively its interpretation of the letter. The contention of plaintiff that the letter was, in effect, a finding that plaintiff was not guilty of the charges pending against him is so ridiculous that it does not merit serious consideration. Counsel for the Commissioners earnestly contend that the Civil Service Act is for the protection of the public as well as the employees, and that it would be a grave mistake to hold that the Commission by the letter of April 12, 1943, decided the case against plaintiff in his favor and thereby exhausted its jurisdiction.

Plaintiff contends that the Commission considered and incorporated in its records hearsay documents; that "the consideration of such hearsay reports deprived the plaintiff of a fair and impartial hearing and of the opportunity to cross-examine about these reports; and their consideration by the Commission was not a mere technical error, but was a matter of substance." It appears that on April 20, 1943, the secretary of the Commission received the following communication:

"Received
"April 20, 1943
"Secretary
"Civil Service Commission

"J.S.O.

"OFFICE OF THE COMMISSIONER OF POLICE

"April 19, 1943.

"To The Honorable

"Civil Service Commissioners.

"Gentlemen:

"On March 31, 1943 a hearing was held by your Commission on charges preferred against Patrolman Chris N. Pope, 31st District.

"The case was taken under Advisement, and you, also, requested that the Captain of this Patrolman's District submit a monthly report on his conduct.

"Pursuant thereto, we attach hereto copies of reports from the Commanding Officer of the 31st District, the Acting Captain of the 33rd District, and Sergeant Wentzel and Lieutenant Brandt of the 31st District, relative to this Patrolman's conduct on April 17th and 18th, 1943.

"This is referred to you for your information and further advice as to the disposition of the matter.

"Patrolman Pope has been suspended as of this date.

"Yours very truly,

"(signed) James P. Allman

"Commissioner of Police

"tps

"31st District, April 19th, 1943.

"From: Commanding Officer, 31st District.

"To: Commissioner of Police.

"Subject: Ptlmn. Chris N. Pope, star #4171, 31st District.

"On April 14th, 1943, Ptlmn. Chris N. Pope, star #4171, 31st District, was restored to duty per Special Order #3176, after being brought before the Civil Service Commission on Charges of Intoxication, Neglect of Duty, Sleeping While on Duty and Leaving Post without Being Regularly relieved.

"His case is still under advisement, as per attached Communication dated April 13th, 1943, from your office.

"On April 13th, 1943, I instructed Ptlmn. Chris N. Pope to report to my office, which he did at 4:00 p.m. I informed him as to the monthly report requested by the Civil Service Commission as to his conduct in the future and that his case was still under advisement. At this time I suspected that he had several alcoholic drinks in his person and informed him to that effect, but he vehemently denied that he had been drinking.

"He worked the 4:00 p.m. to 12 midnight watch at the 31st District on April 14th and 15th, 1943, and on April 16th, 1943, was detailed to the 33rd District with two other patrolmen from the 31st District.

"On April 17th, 1943, Ptlmn. Chris N. Pope failed to report at the 33rd District for duty; neither did he report to the 31st District.

"On April 18th, 1943, the said patrolman failed to report at the 33rd District for duty; neither did he report

to the 31st District.

"Patrol Sergeant Arthur J. Wentzel could not contact the said Patrolman, although he attempted several times.

"On April 18th, 1943, Patrol Sergeant Wentzel, 31st Dist., talked to patrolman Pope on the telephone at about 4:00 p.m. and

"31st District April 17th, 1943

"From: Sergt. Wentzle, 31st District.

"To: Commanding Officer, 31st District.

"Subject: Absent Without Permission. - Ptlmn. Chris N. Pope, 31st Dist.

"At 4:00 p.m., April 17th, 1943, I was assigned by Lieut. Brandt, 31st District, to go to the 33rd District with Ptlmn. Fred Hartmann of the 31st District, to replace Ptlmn. Chris N. Pope, who was detailed to the 33rd District and also ascertained why Ptlmn. Pope failed to report for duty.

"Upon my arrival at the 33rd District I was informed by Lieut. Walsh, 33rd District, that Pltmn. Pope had failed to report for duty. I then went to Ptlmn. Pope's home at 110 S. Kostner avenue, 3rd Floor, arriving there at about 5:10 p.m., 4-17-43 and rang the doorbell several times and also knocked on the door but was unable to receive any response.

"I continued to call his home several times between 6 p.m. and 11:20 p.m. but no one answered the phone. I called the 33rd District and they informed me that they had not heard from or seen Ptlmn. Pope between 3:45 p.m. and 11:45 p.m., 4-17-43.

"(signed) Arthur J. Wentzel
"Sergt, star #41"

Plaintiff contends that the foregoing reports were considered by the Commission in making up their decision, but this contention is not supported by the record. The record shows that the reports were not received by the secretary of the Commission until April 20, 1943. The Findings and Decision of the Commission was filed on that date. It is lengthy document that undoubtedly took considerable time to prepare. In addition to the preparation of that document the Commission also prepared and transmitted to the Commissioner of Police, on the same date, the following letter:

"Commissioners
"Walter L. Gregory
"James B. Cashin

"James S. Osborne, Sec'y.

"CITY OF CHICAGO

"Civil Service Commission

"April 20, 1943.

"Hon. James P. Allman,
"Commissioner of Police,
"City of Chicago.

"Dear Sir:

"The Commission on this date found the following member of the Police Department guilty of the charges indicated, and ordered that he be discharged from the service of the City of Chicago:

"Chris N. Pope, patrolman, 31st dist., F96399:
"Conduct unbecoming a police officer;
"Leaving post without being regularly relieved.

"This case was heretofore taken under advisement.

"BY ORDER OF THE COMMISSION:

"(SIGNED) J. S. Osborne,
"SECRETARY."

We think there is merit in the argument of counsel for the Commissioners that the only reasonable presumption from the record is that the decision of the Commission was rendered prior to the receipt of the interdepartmental reports of April 17 and 18, 1943. Nowhere in the Findings and Decision of the Commission or its communication of April 20, 1943, to the Commissioner of Police is there any reference to the interdepartmental reports of April 17 and 18, 1943. Plaintiff asks why the Civil Service Commission included the interdepartmental reports of April 17 and 18, 1943, in its return if said reports were not considered by it. Counsel for the Commissioners respond that the Commission, as a matter of policy, includes in its return to any writ of certiorari the entire files in the case. Upon the record before us we would not be justified in assuming that the reports in question were considered by the Commissioners in making up their findings and decision.

We find no merit in the further contention of plaintiff that the Civil Service Commission did not follow the form of proceedings legally applicable in that it failed to certify to the Commissioner of Police a proper finding and decision as required by statute.

We have before us the appeal of a former police officer who plead guilty to the charges made against him, and in his own testimony admitted that these charges were true. He was in the possession of a loaded revolver at the time in question, and, as has been well stated recently by the Commissioner of Police, an intoxicated police officer

in the possession of a loaded revolver is a menace to the people of this community and that such an officer will not be tolerated upon the police force of the City of Chicago.

The judgment order of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

44600

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JAMES R. SHEPPARD,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

In his petition for a rehearing plaintiff in error contends that we erred in allowing the supplemental record to be filed by The People and in considering that record in determining the merits of the appeal; that the original certificate of the clerk filed by plaintiff in error is the only one that can properly be considered by this court in determining the merits of the appeal. In support of this contention plaintiff in error calls attention to the fact that the certificate of the clerk of the Criminal court of Cook county attached to the original certificate contains the following language: "I, Vincent J. Poklacki, Clerk of the Criminal Court of Cook County, * * * do hereby certify the above and foregoing to be a true, perfect and complete copy of Common Law Record in a certain cause lately pending in said Court, wherein The People of the State of Illinois were Plaintiffs, and James R. Sheppard was Defendant." Plaintiff in error argues that the certificate of the clerk contained in the supplemental record purports to show that certain orders were entered by the trial court that were not contained in the original certificate; that the supplemental record is therefore an effort to correct the original certif-

icate of the clerk and that this court had no power nor authority to allow the filing of the supplemental record. It is a sufficient answer to the contention and argument of plaintiff in error to state that the purpose and effect of the supplemental record was not to contradict nor correct any order of the trial court that was included in the original certificate of the clerk. Its sole purpose was to enable The People to show by the certificate of the clerk that he had omitted from the original certificate certain important orders that had been entered by the trial court. In allowing The People to file the supplemental record we followed the well-established procedure that applied to the situation and thereby prevented a plain miscarriage of justice in this case. Plaintiff in error insists that Koepke v. Campo, 391 Ill. 355, sustains his contention and argument. That case has no application to a record like the one before us.

The petition for a rehearing is denied.

PETITION FOR REHEARING DENIED.

Friend, P. J., and Sullivan, J., concur.

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44600

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO CRIMINAL
v.	)	COURT OF COOK COUNTY.
JAMES R. SHEPPARD, Plaintiff in Error.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted for assault with intent to commit murder. He waived a jury and the cause was heard by the court upon a plea of not guilty. On April 22, 1946, the court found him guilty of the charge and thereupon counsel for plaintiff in error moved the court to release him on probation. The motion was granted and plaintiff in error was released on probation. On December 19, 1947, there was a hearing on an application for a warrant for violation of probation and an order was entered that a warrant for violation of probation issue in the cause. Plaintiff in error was present in court and was represented by counsel, and the cause was assigned to Judge Leonard C. Reid, who had found plaintiff in error guilty of the charge alleged in the indictment and had granted him probation. He continued the hearing on the warrant for violation of probation to January 16, 1948, and released plaintiff in error on his own recognizance. Plaintiff in error was present and was represented by his counsel, and upon the latter's motion the hearing was continued to February 20, 1948. On that date, by agreement of the State's Attorney and plaintiff in error

and his counsel, made in open court, the cause was continued to April 6, 1948. The common law record shows that on April 12, 1948, the cause came on for hearing; that plaintiff in error was present and was represented by counsel; that the court heard witnesses on the charge in question, and that on motion of counsel for plaintiff in error the hearing was continued to April 15, 1948; also that at that hearing the court ordered the bond of plaintiff in error forfeited and the latter surrendered into the custody of the sheriff "in exoneration of bail." The common law record also shows that on April 15, 1948, there was a further hearing on the said charge and at the same time the court entered an order terminating the probation of plaintiff in error and sentencing him to the Illinois State Penitentiary for a term of not less than three years nor more than five years as provided by law. Plaintiff in error has sued out this writ of error to reverse that judgment order.

Plaintiff in error contends that "the court below had lost all jurisdiction of this cause and of the defendant, when it entered its judgment of April 15, 1948, because neither at the time (April 22, 1946) when the Probation was granted, nor at any other time did the court below enter an order continuing the cause for any part of the Probation period, nor to a specific date." This contention is based upon an incomplete common law record filed by plaintiff in error. After plaintiff in error filed his brief in this court in which he raised the instant con-

tention The People were permitted to file a supplemental record which shows that in the lengthy order granting probation to plaintiff in error the following appears: "* * * that said defendant James R. Sheppard be and hereby is released on probation for the period of 20 months from the date hereof; during which time this cause shall stand continued, subject however during the full period of such continuance to the jurisdiction of the Court in which said cause is pending, or any judge thereof, with full power and authority in the Court to have such proceedings and enter such orders from time to time during such continuance as may be in accordance to law and the proper procedure of this Court." It is significant that after The People filed the supplemental record and answered the instant contention of plaintiff in error the latter filed no reply brief.

Plaintiff in error next contends that "the record of this cause fails completely to show any jurisdiction over the defendant, after the commencement of the Probation, because it fails to show: (a) A rule to show cause entered or directed against the defendant. (b) Any information of any violation of probation, or any other criminal act subsequent to the probation. (c) An opportunity to meet the charges." It is a sufficient answer to points (a) and (b) to state that it has been held (People v. Cahill, 300 Ill. 279) that in a proceeding like the instant one none of the orders of the court are rendered void because of the fact that the record does not show a formal rule to show cause entered against a defendant where it sufficiently appears

that there was a hearing before the court upon that very question and that the defendant undertook to show cause why he should not be sentenced, etc. While no bill of exceptions was filed in this cause it appears from the common law record that on December 19, 1947, there was a hearing before the court on an application for warrant for violation of probation at which plaintiff in error was present and was also represented by counsel; that the court ordered that a warrant for violation of probation issue in the cause; that the hearing on the warrant was continued until January 16, 1948, and plaintiff in error was released on his own recognizance. As to point (c) there can be no question but that plaintiff in error was given full opportunity by the trial court to meet the charge of violation of his probation. He was represented by counsel and the hearing of the charge was continued a number of times at the request of plaintiff in error and his counsel. Although plaintiff in error was given abundant time in which to prepare and file a bill of exceptions, no such bill was ever presented to the trial court, and this writ of error is prosecuted upon a common law record. We are satisfied that if plaintiff in error had not been afforded every opportunity to meet the charge against him his counsel would have filed a bill of exceptions in the cause.

Plaintiff in error contends that "the Court below 'quashed' the warrant. That is the record. There can be no misunderstanding of its meaning. Webster's Dictionary

defines the word 'quash' to mean, in law 'to abate, to annul, to make void.' That is what the Court below did to the warrant for violation of probation. Legally, nothing remained before the Court. The defendant should have been released and discharged upon that order alone." There is no merit in this contention, which is based entirely upon the fact that in the final order entered on April 15, 1948, the following words which we have italicized appear: "It is ordered by the Court that the Warrant for Violation of Probation be and the same is hereby quashed and Probation terminated." The sole function of the warrant for violation of probation was to bring the offender, plaintiff in error, into court and to give him notice that a charge of violation of probation had been lodged against him. At the time of the entry of the order of April 15, 1948, the warrant was already functus officio.

There is no merit in this writ of error, and the judgment of the Criminal court of Cook county will be affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

44675

K. MATSUMOTO,
Appellant,

v.

SAM SACHS, BERNARD STOUT, MAXINE HALBERT, PAUL NAMBO, LEE STAPLES, GEORGE HARMES, FELIX VOSIS, GEORGE GOERNER, ADAM BARTCHER, LUCILLE COLE, LAVERNE KENNEDY, ANTHONY SCOTT, VIOLET LATCHBROOK, WALTER CALL, W. ALLEN, CLARENCE MIURA, MICHIRO TAKATANI, WM. ROBBINS, VICTOR NAVERETTE, MASEO OGAWA, CARL SYLVANDER, CHESTER CARROLL, NED ADAMS, MARTIN MURPHY, T. MINE, and JOHN HEBNER,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

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MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

After the termination of the lease of a building containing more than 25 rooms, and of the garages in the rear, plaintiff brought suit for possession against the tenant and certain roomers or subtenants. Judgment for possession as to the tenant was entered, and no appeal has been taken. Judgment for possession against the roomers or subtenants was denied, and from this judgment plaintiff appeals. The roomers or subtenants have not followed the appeal.

The tenant conducted a rooming house, furnishing the roomers or subtenants certain services, including furniture, water, gas, electricity and ice boxes. The right of such roomers or subtenants ended with the right of the tenant. Rouse v. Reid, 312 Mich. 213, Sexton v. Chicago Storage Co., 129 Ill. 318, and Wilson-Broadway Bldg. Corp. v. Northwestern Elevated R. Co., 225 Ill. App. 306.

The judgment appealed from is reversed and the cause remanded for entry of judgment for possession.

REVERSED AND REMANDED WITH DIRECTIONS.

Tuohy, P. J., concurs.
Feinberg, J., took no part.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1949

Term No. 49M8 Agenda No. 8

ST. LOUIS LIGHTNING PROTECTION CO., a Corporation, Plaintiff-Appellee, -vs- MARY SARAH SARGENT and CHARLES A. SARGENT, Defendants-Appellants.	Appeal from the Circuit Court of Fayette County, Illinois.

CULBERTSON, J.

This is an appeal from a Decree of foreclosure of a mortgage entered in the Circuit Court of Fayette County, Illinois, in favor of Appellee, ST. LOUIS LIGHTNING PROTECTION CO., a Corporation (hereinafter called plaintiff), and against MARY SARAH SARGENT and CHARLES A. SARGENT, Appellants (hereinafter called defendants). The only question presented on appeal is one which grows out of the allegation of the defendants that the note by which the mortgage was secured, lacked consideration, and that the mortgage was consequently unenforceable.

The facts as disclosed from the record indicate that the note was given to secure an open account due the plaintiff from Charles A. Sargent, one of the defendants. The other defendant is the wife of Charles A. Sargent. The plaintiff was in the business of selling lightning protection devices on a wholesale basis, and defendant, who had been buying parts and equipment from plaintiff and selling them on commission, was employed by plaintiff to do engineering work, and it was agreed that defendant, Charles A. Sargent, was to get a 10% commission on the gross contract price for certain

installations secured by him, from which the advances made to him were to be deducted. It is the contention of defendants that the advances which were made to Sargent from time to time were in the nature of expenses incurred as a part of his employment and that while he received commissions for which he did not receive credit in an amount sufficient to cover the account, the defendants contend that the advances were payable only out of commissions when earned, and in absence of such commissions there was no personal undertaking by defendant to refund such advances.

The plaintiff contends that the advances so made were loans to Sargent, which he assumed to pay and for which he was liable, irrespective of whether commissions earned by him were sufficient for that purpose; that Sargent was to pay all of his own expenses. On the hearing of the cause before the Court it was shown that certain of the items involved in the advances consisted of items which were personal in nature, and there was evidence to show that the moneys advanced were treated by the parties as loans; and that some money was advanced to defendant Sargent to pay for damage resulting from fire in an hotel room. The evidence also showed that about a week before the mortgage was made defendant Sargent came to the office of the Company, looked at the book account, and that a statement was given him of the amount due; that he then took the statement to his attorneys and had a mortgage prepared on certain real estate, to secure the debt he owed. The mortgage recited on its face that it was given to secure the payment of a certain open account, payable by the defendant, Charles A. Sargent, to the mortgagee, and the term of the obligation was fixed at two years from that date. Both defendants signed the mortgage and there was evidence to the effect that defendant Sargent said he would pay the debt in two years time. The

mortgage was executed and delivered to the plaintiff.

The evidence showed that after the time of the execution of the mortgage defendant Sargent continued to buy products from plaintiff on credit and made payment for such products, and also that he referred to the existing indebtedness without questioning such indebtedness. No part of the mortgage debt was paid, and the foreclosure suit was thereupon commenced by plaintiff. The Court below, after considering all of the evidence, entered a decree in favor of the plaintiff, and allowing foreclosure.

The matters under consideration in the Court below involved questions of fact. There was evidence to support the conclusion of the Court that there was adequate consideration for the note. As shown by the evidence defendant went so far as to have an attorney prepare the mortgage to secure the payment of the obligation, and the due date of the obligation was extended or foreborne for a period of two years.

Before a Reviewing Court is justified in reversing a decree on the ground that it is not warranted by the testimony, the Court must be able to say that the decree is contrary to the manifest weight of the evidence (COPPEN vs. COPPEN, 395 Ill. 326; MILHAHN, ET AL. vs. WHITEWAY OIL CO., 333 Ill. App. 328). The Court below had an opportunity to see the witnesses and to hear their testimony from the witness stand. He was in a better position to judge and determine the controversial facts in this case than is a Court on review, and under the circumstances we are not in a position to reverse the finding of the Court.

The evidence justified the conclusion of the Court that there was an expressed or implied agreement as between the parties to repay the excess of advances over the commissions earned (WESTERN PICTURE FRAME CO. vs. TUCHIN, 323 Ill. App. 275).

The decree of the Circuit Court of Fayette County will, therefore, be affirmed.

44428

CHARLES P. HENDERSON, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
PENNSYLVANIA RAILROAD COMPANY, a corporation, Appellant.	)	

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under the provisions of the Federal Employers Liability Act to recover damages for personal injuries sustained by him as an employee of the defendant railroad company during the course of his employment. Trial by jury resulted in a verdict and judgment finding defendant guilty and assessing plaintiff's damages in the amount of $47,500.00.

The accident occurred October 22, 1946 at or near Lovington, Illinois. Plaintiff, then 35 years of age, was employed as a locomotive fireman earning approximately $250.00 a month. As fireman it was his duty to spot the tender of the steam engine below the water spout of the tank so that he could pull the spout down and take water into the engine through the manholes of the tender. The spout was twelve feet long, made of steel, and weighed 300 to 350 pounds. At the time of the accident the engine was stopped under the spout, and plaintiff attempted to pull it down from its upright position by grasping a rope attached to it. The spout became disconnected and struck him in the small of the back. He was knocked down, rendered unconscious for a considerable period of time,

and severely injured. Defendant admitted its liability under the Federal statute (Federal Employers Liability Act), and the sole question presented at the trial and on appeal relates to the extent of the injuries and the damages sustained by plaintiff.

As the principal ground for reversal it is urged that the verdict was against the manifest weight of the evidence as to damages, and that the judgment was excessive. Most of the factual evidence is undisputed. It is conceded that plaintiff sustained fractures of four small bones in his back - the transverse processes of the first, second, third and fourth lumbar vertebrae - a fracture of the twelfth rib, and some injury to the eleventh rib. A year later the rib injuries had apparently healed, but it is admitted that as of the date of trial, bony union had not occurred in the fractured transverse processes. The principal controversy arises from differences in opinion among the medical witnesses as to whether plaintiff's injuries are permanent, whether they are disabling, and if so, in what degree.

After the accident the conductor called Dr. Riley of Lovington, who ordered plaintiff removed to the hospital. At plaintiff's request Dr. H. O. Hoffman of Decatur, Illinois, who had attended him and members of his family for a number of years, was called into the case. Upon plaintiff's arrival at St. Mary's hospital in Decatur, X-rays were taken, and plaintiff was placed in a bed with boards underneath the mattress. He had three private nurses for one week of the

30 days he was hospitalized. In addition to medication to relieve the pain, infra-red and heat treatments were applied directly to his back. After the patient's second or third week in the hospital, Dr. Hoffman fitted him with a Taylor brace made of cloth with steel stays fitting over the shoulders and extending to the tip of the spine. At the end of 30 days plaintiff returned to his home, where for another month he was confined to bed most of the time. During that period he experienced pain in both his back and legs, and he also noticed that his hearing was not so good as before the accident. He complained of continual ringing in the ears. Despite daily treatment at Dr. Hoffman's office the pain in the lower back persisted. At the time of the trial he stated that he still slept on boards, under his mattress, but could get only about two hours of sleep at a time because his legs felt numb and he had to get up and walk to stimulate circulation. He also complained of cold sweats at night and occasional sharp shooting pains extending from the hips past his knees. Since the ringing in his ears started, he testified that it has become progressively worse. He has been unable to dispense with the brace because of the pain in his back, and stated that he cannot bend forward more than an angle of 30 degrees, and any twisting movement is accompanied by terrific pain; that he is unable to lift anything, experiences difficulty in rising from a sitting position and getting out of bed; that he needs help in getting dressed and is unable to lace his own shoes.

Dr. H. O. Hoffman, the attending physician and an orthopedic surgeon, described the muscle spasm, marked tenderness over the back, discoloration and X-ray evidence of the fractured transverse processes of the fourth, third, second and first lumbar vertebrae, as well as the fractured rib, which were evident when he was first called into the case, and he testified as to the initial treatment. The patient was given morphine, codeine and some sedatives to relieve the pain, the musculature was splinted, and after the first day or two physiotherapy in the form of infra-red, diathermy and gentle massage was administered. He was confined to his bed for about 12 days; thereafter he was allowed to sit up, and permitted to leave the hospital at the end of a month. Subsequently he visited Dr. Hoffman's office daily, except Sundays, from November 27 until December 11, receiving physiotherapy treatment, and it was Dr. Hoffman's opinion that the patient showed progressive improvement until December 26, the last time he saw him. At that time he advised plaintiff to gradually eliminate the canvas support, increase his activities, and by moderate exercise to rehabilitate the musculature of his back, and he told plaintiff that in his opinion he could go back to work within three or four months. At the time of trial, approximately a year after the accident, Dr. Hoffman had not seen plaintiff since his last visit late in December 1946. At that time the fracture had not united and there was no evidence of a <u>bony</u> union, although a <u>fibrous</u> union, which X-ray would not disclose, had probably resulted.

Because of the patient's complaint on his last visit in December of a numbness in his back which, according to medical testimony, indicates some impairment of the sensory nervous system, Dr. Hoffman referred plaintiff to Dr. John S. Kapernick, a neurologist in Decatur, who obtained a complete history of the case, the injuries and the treatment that plaintiff had received, including a verbal report from Dr. Hoffman, and a statement of the accident and injuries from the patient himself. Dr. Kapernick testified that Henderson was referred to him because of a complaint of numbness, which suggested the possibility of a nerve injury. The examination of the neurologist consisted of various tests to ascertain whether plaintiff's gait was normal, and both during and after the tests Dr. Kapernick observed no limping on the part of plaintiff and concluded that he had a normal gait. Thereafter he also tested the patient's reflexes, intended to determine the normal function of the nerve pathways, tested his sensation by touching him with sharp objects, etc., his ability to balance and to move his spinal column, his sensations in the manner of his orientation in space, the possible numbness of the major trunk system, the function of the joints, and applied the Lasegue test to ascertain whether there was any involment of the sciatic nerve. As a result of these tests Dr. Kapernick concluded that plaintiff had some slight tenderness in the left lumbar area of his back, that there was "minimal" stiffness or spasm of the musculature of the left lumbar back, that his ability to

bend was normal in all directions, and that there was no evidence of injury to any nerves causing any functional disturbance. Following the examination Dr. Kapernick gave plaintiff what he considered "needed reassurance" as to the lack of evidence of serious damage, either because of the fractured processes about which plaintiff was greatly concerned, or because of any significant injury to his nervous system. On trial Dr. Kapernick testified that as the result of his examination, and based upon his experience, there was no evidence of injury to the nerve tissue to prevent plaintiff's return to work; that his "back problem was not an unusual one and that he should be able to return to work within a reasonable time, probably three or four months."

As against this evidence plaintiff introduced the medical testimony of several physicians, including Drs. Leon Aries and Horace Turner, both orthopedic specialists or surgeons, and Alfred Lewy, a specialist in ear, nose and throat ailments. Dr. Aries examined plaintiff March 20, 1947 in his office in Chicago. He testified that he "observed a young man approximately thirty-six years of age, who walked into my office in a very upright and rigid position. When he was asked to sit down, he supported himself on the arms of a chair and sat down very carefully. After asking him to go into the examining room, he again arose with the support of his hands on the sides of the chair, and walked into the examining room very rigidly. After removing his clothes I found that he was wearing a brace" which "kept him in a rigid position." Upon removing the brace and having the

patient stand without support for a few minutes, Dr. Aries found that there was a "loss of the normal curve of the back, that is, in the lumbar, lower part, the lordosis of the back. *** There was a flattening in the back, which was accompanied by a marked spasm of the muscles in the back. The muscles were in a tense state of contraction, which is an attempt to support the spine in a rigid position. *** Spasm is usually involuntary. *** Muscle spasm indicated that there is an attempt on the part of the body to support some irritation that is beneath it. *** I had occasion to passively manipulate the back of Mr. Henderson on my first examination. On attempt to bring the body forward with the patient being positioned, with the patient lying flat on the examining table, attempting to lift the patient, I could bring him up approximately 45 degrees *** without resistance, and following that there was spasticity, resistance, resistance of the muscles in the back to forcing the patient up further. *** By moving the patient backward, there was definite resistance in the muscles of the back, attempting to hold him in a rigid position, and backward flexion was limited to approximately 50 degrees. *** There was tenderness along the left vertebral border from the twelfth dorsal to the fifth lumbar, which corresponded to the transverse process of the second, third, and fourth lumbar vertebrae. This tenderness was limited to an area of about two inches in diameter along the left lateral border of each vertebral body. There was also a point of tenderness over the twelfth rib at its junction with the twelfth

vertebral body." After describing his objective findings, Dr. Aries was shown X-ray photographs in which he observed "pathology or abnormal conditions" consisting of a fracture of the eleventh rib, a transverse fracture of the twelfth rib and fractures of the transverse processes of the lumbar vertebrae. He stated that "there is a separation of the fragments" as indicated which "means that there is no bone between the fragments that are displaced laterally in its origin or attachment to the vertebrae here; that there is a void or space between the bones there. The muscles in the attachment to the transverse processes have to have a rigid support, so that when they contract they can pull the bones to which they are attached toward the rigid body. When there is a separation of the transverse processes, which is not rigidly supported, it is not rigidly supported to the vertebral or bony column, therefore if the muscles contract, instead of the transverse processes remaining rigid, and holding the muscles, the muscle pulls them away from the original position of attachment, so that there is motion of the fragments in the transverse processes there, which should not be there." He also observed from the X-rays an absence of the normal curve of the back, and various other pathological or abnormal conditions. Dr. Aries testified that on subsequent examinations he did not find any improvement in plaintiff's condition, and gave it as his opinion that the injuries to plaintiff's back were of a permanent nature, that the dizziness of which plaintiff complained and the loss of hearing could be attributed to the injuries result-

ing from the accident in question.

Dr. Turner examined Henderson September 29, 1947 in his office. Objectively he noted that plaintiff limped on the left side as he walked. On examining him from head to foot he "found objectively that the man had a spasticity of the erectus spina muscles on the left side of the back in the lumbar region. In addition to that, I found that he had what I called a positive Lasegue Test on the left side; also, he had a positive Goldthwaite Test on the left side." Dr. Turner explained that by "spasticity" he meant an involuntary contraction of the muscles. Referring to the X-rays, the witness observed that the transverse process of the first lumbar vertebra had been broken loose and separated from its normal attachment by about one-fourth of an inch; that the transverse process of the second lumbar on the left side had been broken loose and separated from its normal attachment by about three-fourths of an inch; that the transverse process on the left side of the third lumbar vertebra likewise had been broken loose and was separated from its normal attachment by about three-fourths of an inch; and that the transverse process on the left side of the fourth lumbar vertebra had also been detached. He stated that the absence of the anterior curve of the lumbar spine "changes the weight-bearing alignments of the spine itself, so that instead of having a facet joining, a normal relationship, one with the other, they are in abnormal relationship; and also the musculature which is attached to the spine on both the right and the left side is changed in

its relationship to the spine by the change in the curve of the spine." Upon the basis of his examination and experience Dr. Turner gave it as his opinion that the character of the pathology as shown in the X-ray film is permanent. He stated that "the reason for my opinion is that the period of healing between the time of the original fracture, which is a considerable time before this picture was taken, that if nature were going to heal the fracture she has had ample time to do so, and inasmuch as they have not been healed and are still un-united at this time, I would consider from my experience that it is permanently un-united."

In response to hypothetical questions to both Drs. Aries and Turner, they testified that there could or night be a causal connection between the accident as outlined in the hypothesis and the ill-being of the hypothetical person, and that the ringing in the ears and partial deafness of which plaintiff complained had a causal connection with the injury.

Dr. Alfred Lewy, testifying from his original records, stated that there was a redness in the upper part of both drum membranes. He found a scar in the vicinity of one ear, resulting from a previous head injury. Dr. Lewy stated that plaintiff had difficulty in hearing him at a normal distence for normal hearing. He tested plaintiff's hearing at various frequencies with the audiometer, an electrical instrument commonly used for measuring the hearing, and added that he had administered several thousand such tests in the course of years. He found that plaintiff had "a substantial loss

of hearing" or, specifically, a loss of between 25 to 30 per cent. Dr. Lewy had never examined or attended plaintiff before April 2, 1947, the date of the examination to which he was testifying, and therefore had no means of comparing plaintiff's hearing deficiency of that date with the condition of his hearing prior to the date of the accident. As a result of his examination he was of the opinion, based upon a reasonable degree of medical and surgical certainty and upon his experience as a specialist in ailments of the ear, that the loss of plaintiff's hearing could or might be caused by the injuries which he sustained when he was struck by the water spout.

The differences in opinion as to the nature and extent of plaintiff's injuries relate principally to their permanency. As already indicated, Drs. Hoffman and Kapernick were of the opinion that the vertebral fractures would not permanently incapacitate plaintiff and that the muscular spasticity would eventually disappear. Drs. Aries and Turner thought otherwise, and both stated that they considered the injury, as shown by their examinations of the patient and their reading of the X-rays, to be permanent. On rebuttal Dr. Turner testified that in his opinion, based upon a reasonable degree of medical and surgical certainty, plaintiff was in need of an operation for the purpose of extracting the four fractured transverse processes. He said this operation could be accomplished by making an incision about eight inches long in the back over the site of the fractures, cutting down through the skin and dissecting down through the fascia

covering the large muscles, whereupon the surgeon would have to explore in order to locate the fragments of bones; that after the wound was closed the patient would be put into a cast to aid healing for a period of about eight weeks, and following that he would wear a back brace for a period of about six additional months. The purpose of such an operation would be to relieve the patient of the irritative factor of the broken bones which in an ununited state cause pain when the muscles contract.

There is no doubt that plaintiff has experienced considerable pain, and he states that at times his legs will not function properly. Up to the time of the trial he had done no work whatsoever. All these circumstances were presented to the jury, who evidently believed that plaintiff's injuries were of a permanent nature. As the result of the accident he has in all likelihood been incapacitated for the probable expectancy of some 20 years or more from pursuing his employment as a locomotive fireman, at which he was earning approximately $3000.00 a year, with ultimate pension rights, and in his present condition his future earning capacity is undoubtedly greatly impaired. Under the circumstances and after a careful examination of the record we have reached the conclusion that the verdict is not contrary to the manifest weight of the evidence as to damages.

In the course of the trial defendant offered in evidence a copy of the records in St. Mary's Hospital in Decatur pertaining to plaintiff's confinement there, and

the records were marked defendant's exhibit 6 for identification. Subsequently, when offered in evidence, the records were excluded because the trial judge was of the opinion that no proper foundation had been laid for their admission. A dispute arose as to the effect of an agreement on the part of plaintiff's counsel that copies of these records would be used in place of the originals. The record on appeal discloses that plaintiff merely agreed that the documents offered were correct copies of the originals. His counsel argued and he now contends that even the original would not have been admissible, and the court evidently adopted that view and excluded the evidence. No evidence was offered as to who made the entries or as to their correctness. It was held in Wright v. Upson, 303 Ill. 120, that "if the hospital record is admissible at all it is for the same reason that books of account are admissible and the same character of proof is required, and all persons who make entries therein are required to testify to their correctness before they are admitted in evidence." To the same effect see Kimber v. Kimber, 317 Ill. 561.

The case was fairly tried, and for the reasons indicated we think the judgment should be affirmed. It is so ordered.

Judgment affirmed.

Scanlan and Sullivan, JJ., concur.

44402

PEOPLE OF THE STATE OF ILLINOIS ex rel. EVELYN McKEE, Appellee,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
MARK T. McKEE, Appellant.	)	

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The respondent Mark T. McKee appeals from an order of the Superior Court sentencing him to six months in the county jail for contempt of court because of his failure to produce Terry, his minor child and that of petitioner, in response to a writ of habeas corpus.

Evelyn McKee, respondent's divorced wife, filed her petition for a writ of habeas corpus in the Superior Court of Cook County on Sunday, November 16, 1947. On the same day the court ordered the sheriff of Cook County to "keep Mark T. McKee in his custody until" he filed "a bond with proper surety for $25,000.00 conditioned upon the appearance of Terry Alexander McKee in this court on November 18, 1947, at 10:00 A.M.," and immediately following the issuance of that order McKee was committed to the county jail where he remained until sentenced for contempt two days later.

When he appeared in court on November 18, in custody of the sheriff, he signed and filed a return stating that the writ was served upon him after 3:30 p.m. on the afternoon of November 16; that he had the child in his custody and control within the jurisdiction of the court on the morning of November 16 until 10:30 a.m; that he then relin-

quished custody of the child to his son-in-law Paul Guislain, not then anticipating the issuance of a writ of habeas corpus; and that since that time in the forenoon he had not seen the child, nor did he at any time subsequent thereto have the custody or control of Terry, nor did he give any instructions or make any provisions for the exercise of control over him since that time.

After an informal hearing directed principally to respondent's request for a continuance so that he could consult his counsel and obtain his release from custody upon reasonable bail, an order was entered finding that a petition for a writ was filed November 16; that McKee was served on that day about 3:15 p.m.; that at the time the petition was filed the child was within Cook County, and when respondent was served the child was within the jurisdiction of the court; that respondent refused and neglected to obey the writ by producing Terry; that he failed to make a full and explicit return to the writ in the time required by statute; and that no sufficient excuse was offered for his refusal and neglect. After reciting sections 15 and 30 of the Habeas Corpus Act (Ill. Rev. Stat. 1947, ch. 65), the court found respondent guilty of contempt "under the Habeas Corpus Act" and directed the sheriff of Cook County to take him into custody and commit him to the county jail for the period of six months, and further directed the clerk of the court to issue a contempt mittimus accordingly.

It appears that in 1945 respondent obtained a decree of divorce from petitioner on grounds of adultery and was

awarded the custody of Terry, their minor child. Later, August 1, 1945, the Superior Court of the County of Los Angeles, California, awarded the custody of the child to petitioner, and an appeal was taken by respondent to the Appeals Court of California, which affirmed the Superior Court. On January 13, 1947, when the Appeals Court of California filed its decision, the minor child was in the custody of respondent in Canada and was never returned to the State of California. On Sunday, November 16, 1947, respondent brought Terry to Cook County, Illinois, to visit Mr. McKee's daughter by a prior marriage who was leaving, with her husband, the Peruvian consul, for a foreign country, and on that day petitioner, who was then a resident of California, filed the writ of habeas corpus, predicated upon the California decree for the custody of the child.

In the course of the informal hearing on November 18 a private investigator and a lawyer from the State of Michigan stated that at or about the time the writ was served they and petitioner could see the child coming down the inner stairway in the home of respondent's daughter while they were standing in a neighbor's home some sixty feet away. Respondent denied that the child was there, and his son-in-law stated that he had previously noticed strange people hovering in the vicinity of his home, and fearful that something might happen to the child and being aware of efforts that had been made by petitioner in an attempt to obtain the child, he secreted it in another home in Park Ridge, Illinois, and from there took Terry to Wisconsin,

where he turned him over to a son of the respondent by his first marriage, who returned the boy to Canada.

The order sentencing respondent to six months in jail for contempt of court is predicated on section 15 of the Habeas Corpus Act, which is set out in full. Respondent's counsel say that they are unable to find any cases in Illinois interpreting the Habeas Corpus Act in the light of that sentence, but in New York a statute, containing language similar to ours, was discussed in People ex rel. Kniffin v. Knight, 56 N.Y.S. (2) 108. Section 1248 of the Civil Practice Act of New York provides as follows: "Where a person who has been duly served * * * refuses or neglects, without sufficient cause shown by him, fully to obey it (by making his return and producing the prisoner), * * * the court or judge before which or whom it is made returnable, upon proof of the due service thereof, must issue forthwith a warrant of attachment, directed generally to the sheriff * * * commanding such officer * * * forthwith to apprehend the delinquent and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made committing him to close custody in the jail * * *. The order must direct that he stand committed until he makes return to the writ and complies with any order which may be made by the court or judge in relation to the person for whose relief the writ was issued." In the Kniffin case respondent was served with a writ of habeas corpus taken out by his wife who sought to recover the children who had been awarded to her in a divorce decree

and who had been taken by the husband who refused to return them to her. The court denied a motion to adjudge the respondent guilty as for contempt and said that the remedy there was to make application for a warrant of attachment for the apprehension of respondent, as prescribed in the foregoing section of the New York statute, holding that "it is settled in this department that the sole remedy for failure to make a return and to produce a child as required by a writ of habeas corpus, is that prescribed by Section 1248 of the Civil Practice Act." Respondent calls our attention to Ex parte Moore, 64 N.C. 802, wherein provision for attachment in habeas corpus is covered in the North Carolina statute as follows: "If any person on whom a writ of habeas corpus is served, shall refuse or neglect to obey the same by producing the body, &c., within the time required, and no sufficient excuse be shown, it shall be the duty of the Judge or Court forthwith to issue an attachment against such person, * * * and such person shall be committed to jail, until he shall make return to the writ, and comply with any order that may be made in relation to the party for whose relief the writ shall have been issued." With respect to this statutory provision the court said that the "act in question does not rest on the idea of punishing for a contempt of the Judge, or Court, but of compelling a return to the writ, and the production of the body." Section 15 of our Habeas Corpus Act contains similar provisions and prescribes the power given to the court as follows: "shall enforce obedience by attachment

as for contempt." Respondent contends that if he had refused or neglected to obey the writ without sufficient excuse, the court would have been limited under section 15 to the issuance of a writ of attachment and the holding of respondent in custody until he complied with the order of the court. Section 15 does not set up any process or procedure for fixing a definite sentence for contempt; it merely provides for an attachment as for contempt. The attachment obviously must issue first; then the respondent may be held until he complies with the writ, and he can be held until he produces the person named in the writ, or shows good cause why he cannot do so.

Petitioner's counsel evidently concurs in this interpretation of the language and intent of section 15, for he states that although there is no provision in the Habeas Corpus Act of this state for fixing a definite sentence as for contempt, as was done in this case, nevertheless "we assume that the trial court acted under its inherent power to punish for contempt. The trial court was not limited to the Habeas Corpus Act." However, this was not a direct contempt, which ordinarily consists of something done or omitted to be done in the presence of the court tending to impede or interrupt justice or lessen its dignity. In such cases contempt may be punished summarily and without any preliminary affidavit, process or interrogatory. Tolman v. Jones, 114 Ill. 147; People v. Gard, 259 Ill. 238. In the case at bar respondent's course of action occurred in whole or in part out of the presence of the court and therefore con-

stituted a constructive or indirect contempt, dependent for proof upon evidence of some kind, and the prerequisite of notice, citation or rule to show cause served upon him. In People v. Sherwin, 353 Ill. 525, the court distinguished between the two classes of contempts as follows: "It has long been established by the decisions of this and of other courts that a criminal contempt which is direct in its nature - i.e., which takes place in the very presence of the judge, making all of the elements of the offense matters within his own personal observation and knowledge, or which occurred out of his presence, if admitted by the contemnor in open court - may be punished summarily by the court without any formality of pleading, notice or answer. (People v. Rockola, 346 Ill. 27.) It is, we think, equally well established that if the contempt is indirect - i.e., one which in whole or in an essential part occurred out of the presence of the court and which is therefore dependent for its proof upon evidence of some kind - there must be a notice, citation or rule to show cause served upon the alleged contemnor. (Ex parte Savin, 131 U.S. 267; Cooke v. United States, 267 id. 518; 4 Blackstone's Com. 286.) *** If he has been denied the protection of the constitution, the fact that he has been guilty of contempt of court cannot justify his imprisonment. An examination of the record discloses that the adjudication of guilt is at least in part necessarily based upon facts outside the personal knowledge of the presiding judge and facts which could only be determined by the asking of testimony." Under this and other decisions which might be

cited, the obvious conclusion is that the contemnor could not summarily be punished for contempt, and without some process, pleading or rule to show cause the trial court was without authority to find him guilty and sentence him. The rule is clearly stated in Cooke v. United States, 267 U.S. 517, as follows: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." Under the circumstances it is apparent that the court could not have acted under its inherent power to punish for contempt without giving respondent a reasonable opportunity to meet the charge preferred against him by way of defense or explanation.

When respondent appeared before the court on November 18 he had been in the custody of the sheriff and detained in the county jail continuously since the evening of the 16th, and when he failed to produce the child in court as directed, we perceive no reason why an attachment should not have issued against him under section 15 of the Habeas Corpus Act, within the language and intent of that statute, requiring him to obey the writ or affording him an opportunity to show or explain his refusal or neglect; and if the court was then still of the opinion that he had refused or neglected to obey the writ by producing the child or failed to make a full or explicit return thereto, the court would have had the power under the statute to order him held in custody until such time as he would have produced the

child. In the informal hearing had on November 18 respondent offered to prove that after the California Court of Appeals had awarded custody of the child to petitioner, she followed respondent to Linwood, Ontario, and there instituted habeas corpus proceedings to regain custody, and that the Canadian Court gave respondent the custody of the child after a full hearing. The trial judge in this proceeding took the position that he was not at all concerned about hearing or looking into the decree that was entered in Canada and that he would recognize only the California decree. It is unnecessary for us to pass upon respondent's contention, supported by authority, that full faith and credit should have been given to the decree of the Canadian Court, which was the last decree entered in the controversy between the parties; suffice it to say that for the reasons indicated the court was not justified in sentencing respondent to six months in jail under section 15 of the Habeas Corpus Act, and that there was no inherent power to sentence him as for contempt without issuing an attachment and giving him an opportunity to show sufficient excuse or cause for his refusal or neglect to produce the child as directed. The order of the Superior Court is therefore reversed.

Order reversed.

Scanlan and Sullivan, JJ., concur.

44533

SOL GOLDBLATT, Appellee,

v.

MARK PERLMAN, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible entry and detainer against defendant in the Municipal Court of Chicago. Summons was duly served, appearance filed and the case set for trial and heard April 1, 1948, resulting in judgment for the plaintiff for possession of the premises and the staying of the writ of restitution for five days. On April 5 defendant presented a motion and verified petition to vacate the judgment and for a new trial. After that motion was denied on the day it was made, notice of appeal and service thereof was filed, and on April 8, 1948 the appeal bond was approved and filed. After the appeal had thus been perfected and the record filed in the Appellate Court, plaintiff moved to dismiss the appeal on the ground that defendant had not filed his appeal bond within the five-day period as prescribed by the Forcible Entry and Detainer statute (Ill. Rev. Stat. 1947, ch. 57, sec. 18, par. 19). The First Division of the Appellate Court denied the motion. The case was thereafter regularly assigned to this division of the court, and upon motion of plaintiff to vacate and set aside the order of the first division denying his motion to dismiss the appeal and to reconsider his new motion to dismiss the appeal in accordance with another petition filed for that purpose,

we reserved the matter to hearing.

In defendant's notice of appeal filed April 5, 1948 he sought not only the reversal of the judgment entered April 1 finding him guilty of unlawfully withholding the premises described in the complaint, but also reversal of the order of April 5 denying his motion for a new trial. The gist of plaintiff's contention for dismissal of the appeal is that under the Forcible Entry and Detainer Act defendant, in order to vest this court with jurisdiction, was obliged to file not only his notice of appeal within five days, but also the bond, and his counsel say that although the notice of appeal was filed in apt time, the appeal bond was not filed until April 8, and that this delay in filling the appeal bond is fatal. Since this case was argued orally defendant's counsel has furnished us with an additional typewritten brief at the request of the court wherein he has ably and exhaustively dealt with the question presented, and has cited and discussed substantially all the authorities upon that phase of the case. The gravamen of his contention is that since the motion to vacate the judgment and for a new trial was not presented until April 5 and before he had perfected his appeal by filing notice of appeal, he had five days after the motion was denied in which to file his notice of appeal and bond under the provisions of the Forcible Entry and Detainer statute. We think this contention is well taken and in accordance with the holding of recent decisions. Kruse v. Ballsmith, 332 Ill. App. 301; Corwin v. Rheims, 390 Ill. 205. These cases hold that a motion to vacate or set aside a judgment or decree

stays the time within which the notice must be filed, and that the time for filing such notice begins to run from the date such motion is disposed of. See also In re Estate of Collignon, 333 Ill. App. 562, where, by analogy, it was held under section 330 of the Probate Court Act that a motion to vacate an order of the Probate Court, made within the twenty-day period provided in that statute, stayed the finality of that order until the motion was disposed of, citing Hosking v. Southern Pacific Co., 243 Ill. 320, and Corwin v. Rheims, supra. Under the rationale of these authorities, we hold that the renewed motion to dismiss the appeal should be denied, as was the original motion made by plaintiff.

Plaintiff's suit for possession is predicated on the theory that certain acts of nuisance were committed by defendant which entitled plaintiff to terminate the tenancy and obtain possession of the premises. The parties devote considerable space in their briefsto a discussion whether the preponderance of the evidence proved the claimed acts of nuisance; but in the view we take it will be unnecessary to discuss this evidence because we have reached the conclusion that the notice served by plaintiff did not comply with the statute and was fatally defective. The notice concludes as follows: "You are hereby notified to cease and desist from these violations within ten days from service of this notice, in default of which I shall consider your tenancy terminated, and proceed accordingly." Section 9 of the Landlord and Tenant statute (Ill. Rev. Stat. 1947, ch. 80, par. 9) provides that "when default is made in any of the terms of a lease, it shall not be necessary to give more than ten days' notice

to quit, or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of such lease * * *." This section of the statute prescribes the form of notice required. In essence the prescribed notice must contain a termination of the lease, the nature or character of the default, and make a demand for possession by a certain time. The notice served by plaintiff in the case at bar did not satisfy these requirements. There was a complete omission of any words declaring a definite termination of the lease, or demanding possession, the refusal of which would form the basis for a forcible entry and detainer proceeding. The implication in the notice that the tenant had committed a nuisance or other violation of the written lease, followed by the admonition to the tenant "to cease and desist from these violations within ten days from service of this notice," together with the statement that "in default of which I shall consider your tenancy terminated and proceed accordingly," amounted to nothing more than a warning that other appropriate proceedings would follow. The words "proceed accordingly" cannot fairly be interpreted to constitute a demand for possession in the event the tenant refused to heed the warning; that language might equally well imply a suit for waste, a complaint for injunction or abatement, or a charge of disorderly conduct.

Evidently recognizing the deficiency of the notice as required by statute, plaintiff now contends that he was not bound to give notice before suit was filed because the lease waived any requirement of notice. The early case of McKinney

v. Brady Foundry Co., 175 Ill. App. 569, is precisely in point. In that case the landlord served the tenants with a written notice of his election to terminate the lease and a demand for immediate possession. The court held the notice to be insufficient under section 9 of chapter 80 because it called for immediate possession, whereas that section provided for not more than ten days' notice. In that case the landlord likewise contended that a compliance with the statute was waived by the terms of the lease. With respect to this contention the court held that "having undertaken to terminate the tenancy by notice and demand for rent and possession, such notice and such demands must conform to the provisions of the statute above quoted, before right of action by forcible entry and detainer accrues. This he did not do. The suit was, therefore, properly dismissed."

The notice in this case was clearly defective. The suit should have been dismissed. For the reasons indicated the judgment of the Municipal Court is reversed, and judgment is entered here for defendant for costs of this appeal.

Judgment reversed and judgment here for defendant for costs of this appeal.

Scanlan and Sullivan, JJ., concur.

44554

ALICE RUSSELL, Appellant,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Appellee.	)	

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff Alice Russell brought suit against the Illinois Central Railroad Company to recover damages resulting from an injury alleged to have been sustained by her while a passenger on defendant's train running from Miami, Florida to Chicago, Illinois. Trial by jury resulted in a verdict and judgment for defendant, from which plaintiff has taken an appeal.

Although plaintiff alleges general negligence in the operation of the train, the gist of the action as evidenced in the pertinent paragraphs of the complaint, is that defendant carelessly, negligently and improperly propelled and operated the train at a high rate of speed, and suddenly and without warning "violently jerked, jarred and swayed" the train, "whereby the plaintiff was caused to be and was thrown to, upon and against the interior and floor of said train."

The alleged accident occurred around noon on February 7, 1946, some 30 miles north of Haleyville, Alabama. The train was made up of a two-engine Diesel locomotive and seven cars. It left Haleyville at 11:47 a.m. and came to a stop at Coker Spur, Alabama, 32 miles away. The accident occurred between those points. Plaintiff testified that she

and Mrs. Fannie Pian, a fellow passenger who sat beside her, went into the diner about 11:30 a.m., where they remained for about half an hour. Plaintiff left the diner about noon to return to her reserved seat which was next to the window and separated from the adjoining seat by a collapsible arm rest. She testified that as she started to slide in toward her seat, with the arm rest in position, "there was a terrific jerk and it threw me forward and threw me back, my back against the arm rest," with the result that the lower part of her spine struck the arm rest. Mrs. Pian also testified that there was a terrific jolt and that plaintiff fell forward and then back. Both witnesses testified in effect that as the result of the jolt "the people in the seats fell out of their seats, * * * and there was a terrific uproar * * * a lot of excitement." Someone had reported to Pauline Rahn, the stewardess, the seat number of a passenger who was complaining of pain. The stewardess came to plaintiff's seat about noon while the train was still in motion and asked plaintiff what had happened. She replied that she had been hurt on the collapsible arm rest of her seat as she slid in. According to the stewardess, no one on the train except plaintiff had made any complaint. In the course of several conversations with the stewardess during the day and that night plaintiff made no claim that any jolt or jerk had occurred. Once during the afternoon the stewardess saw plaintiff outside the train while it was stopped, and she observed plaintiff away from her seat several times that evening.

The report of the occurrence was transmitted by the stewardess to Joe Rankin, passenger agent, who talked to plaintiff. He merely inquired whether she was resting all right and whether there was anything that he could do for her. "I understood that the stewardess had taken care of her and had given her aspirins. I did not have any conversation with her about how she got hurt, or anything of that nature. Part of the time she wasn't in the seat."

Various other witnesses, including the engineer, fireman, baggageman, flagman, dining-car steward, a waiter, a chef and a passenger, all testifying on behalf of defendant, stated emphatically that there had been no jolting, jerking or unusual movement of the train, and no commotion of any kind between Haleyville and Coker Spur, and apparently no complaint was made by any other passenger of any jolt, jerk or unusual movement in the operation of the train between those two points.

The baggageman John Hall testified that after leaving Haleyville, J. C. Frederick, the fireman, came into the baggage car, opened the door, looked out and told Hall there was something wrong, and then went back to the engine. After he left, the brakes were gradually applied. He then saw Frederick hanging on the side of the engine, and when the speed of the train had been reduced to five to six miles per hour, Frederick dropped to the ground and jogged alongside the train, looking at the wheels. All stated that the train traveled from one-half to three-quarters of a mile after the brakes were applied, during which time

there was no forward or backward movement or any jerks or jarrings of the train. When the train finally stopped it was observed that the rear wheels of the engine were overheated and had become "frozen." Plaintiff ascribes this condition to the "lack of lubrication," and upon trial she sought to establish some connection between this circumstance and the alleged jarring and jolting of the train when it was being brought to a stop for repair work, which took some six to seven hours. However, it clearly appears from the evidence that plaintiff's alleged injury was not connected in any way with the train stop, but had occurred about 15 minutes before. Both plaintiff and Mrs. Pian admitted that plaintiff was injured 10 to 15 minutes before the train stopped.

Plaintiff states in her brief that after the train left Haleyville and had reached Coker Spur, the fireman Frederick "smelled something unusual like something hot, looked out and saw smoke coming from beneath the engine. He notified the engineer, William Flack, to slow down. Flack applied the emergency brakes while the train was moving at the rate of 60 miles an hour, and brought it to a stop in about a quarter of a mile." The train crew presents an entirely different version of the occurrence. Frederick stated that sometime after leaving Haleyville he smelled something hot in the back part of the engine; that he went into the baggage car immediately behind, leaned out from its open side door and saw smoke coming from the rear engine wheels; that the train was going 60 to

65 miles an hour; that he then went back to the engine cab and told Flack, the engineer, to slow down. Flack verified this conversation, and said that he put on his service application of seven to ten pounds of air. Frederick then went back some 35 feet to a door in the side of the engine, opened it and backed out, standing on the stirrup facing the car and holding onto the door handles above. By that time the speed had been reduced to 40 miles an hour. He hung on and watched the rear wheels, occasionally releasing one hand to give the slow signal to Flack, who was looking out of his window. Flack testified that while the latter was in that position the train continued for another half mile. By that time the train speed had been reduced to four to six miles an hour, and Frederick then swung off the engine and walked alongside for the last 80 feet of the train's movement. Flack testified that there were no sharp curves between Haleyville and the place of the alleged accident which could cause any undue movement of the train, the track being "mostly straight" on that section of the run, and Frederick stated that there was no jolt, jar or unusual movement connected with the stop or at any time between Haleyville and the train's final stop. Flack testified that the train traveled three-fourths of a mile after the service brakes were applied and before it finally stopped.

The record is quite voluminous, but the foregoing is a fair summary of the gist of the testimony adduced on behalf of plaintiff and defendant. Upon this state of

the evidence plaintiff contends that the verdict is contrary to the manifest weight of the evidence. According to the plaintiff and Mrs. Pian the accident occurred around noon, anywhere between 15 to 30 minutes before the incident connected with the overheating of the wheels had occurred, and other evidence fully corroborates this fact. Clearly there could have been no connection between plaintiff's injury and the ultimate stopping of the train near Coker Spur. It was for the jury to determine whether plaintiff was injured as charged in her complaint by the jerking, jolting and negligent operation of the train. In view of the evidence to the contrary, and the fact that plaintiff herself evidently made no such complaint immediately after she was injured, the jury was fully justified in concluding that the charges of negligence alleged had not been sustained by the evidence.

As the other principal ground for reversal it is urged that the court was hostile to plaintiff, and that remarks of counsel for defendant prejudiced the jury. Because of a suggestion that the abstract did not fairly reflect the course of proceedings we have read parts of the record pertaining to these charges with great care. While it appears that the court overruled many of plaintiff's objections, and at times admonished plaintiff with seeming impatience to answer questions propounded to her because of her evasion or refusal to answer as directed or because she volunteered information not contemplated by the question, we think that in view of the repeated

"bickering" during the trial which lasted two weeks, the court was temperate under rather trying circumstances.

The charge that the conduct of defendant's counsel was prejudicial relates entirely to statements made during the closing argument. There is no suggestion that defendant's counsel did anything improper prior thereto. It is freely admitted that neither of the attorneys maintained perfect poise during this part of the proceeding. In his opening argument plaintiff's counsel constantly referred to defendant's counsel by name, and in effect charged that he had "framed" the entire defense; that he had "conveniently" managed to put an employee in every car; that when a witness made a slip the next witness came and attempted to correct it; that the defense was prepared right outside the court room; etc. Defendant's counsel was clearly within his right in answering these charges; he would have been remiss in his duty if he had not done so. Without detailing the argument made in plaintiff's opening statement and defendant's reply thereto, we are satisfied that plaintiff's counsel, who first offended in this regard, cannot complain of the reply that was made to his improper remarks. Kenna v. C.H. & S.E. R.R. Co., 284 Ill. 301. In Field v. Ingersoll, 228 Ill. App. 457, it was held that "a party can have no just ground for complaint on account of remarks improper in themselves, which have been necessitated by like remarks on the other side. When the attorney for the losing party is the aggressor in matters of this kind, thereby challenging reply from

his opponent, the court will not punish the prevailing party by granting a new trial for indiscretions committed by his counsel, unless it clearly appears that the verdict is improperly influenced by such statement." Merely as an example of some of the statements made by plaintiff's counsel in his opening argument we cite the following. In respect to the evidence introduced by defendant, counsel said: "It is undisputed that Freels, with his arranged army of investigators, could have gone out and brought in neighbors if there was any lie about the fact that she did her own home work and took care of that family and kept them together. There was no such evidence or John Freels would have had it here." Comments relating to the failure of Dr. Furey, who was present in court but failed or refused to corroborate plaintiff's other medical witnesses, follow: "Now, what in the world is there, when Dr. Furey, the head of the Medical Association--not a member of the crew such as has been exhibited by defendant by the two musketeers who come in here at fifty or seventy-five dollars an hour?" This reference to his own medical witness challenged reply by defendant's counsel which was not improper. In any event, substantial justice was done upon the trial of this case and the correct aggregate result has been reached. Under the circumstances we would not be justified in reversing upon the record presented. Empire State Surety Co. v. Schillinger Bros., 167 Ill. App. 632. In Chicago City Railway Co. v. Barron, 57 Ill. App. 469, the court observed

that "if, upon the evidence, the right of the plaintiff to the recovery which he has obtained were clear, many uncommendable things that occurred upon the trial might be passed over * * *." The same logic must be applied to the case at bar.

In the light of what we have said, the contention of plaintiff that the court should have directed a verdict for the plaintiff requires no further comment. It would have constituted error to do so.

Lastly, it is urged that the court erred in giving defendant's instructions 19 and 20. Instruction 19 sets forth the duties of a railroad company to a passenger on its car, and includes the statement "And in this case, the mere fact that the plaintiff was a passenger and was injured, does not entitle her to recover." We think this is a correct statement of the law. Mere proof that a party was a passenger and received injury, without showing the cause of the injury or the responsibility of the railroad therefor, would not support a verdict. Moreover, the foregoing statement was immediately followed by the proposition: "Unless you believe from a preponderance of the evidence that the defendant negligently injured the plaintiff while the plaintiff was in the exercise of reasonable care for her own safety, your verdict should be not guilty." We find nothing wrong with this instruction. Plaintiff also complains that by so instructing the jury the court took from it the <u>res ipsa loquitur rule</u>. That doctrine has no application to this case. Plaintiff

charged specific negligence, alleging in several paragraphs of her complaint that defendant negligently operated its train by jolting and jarring it so that she was thrown against the collapsible arm rest of the seat which had been assigned to her, and plaintiff's entire case was predicated upon evidence to support that proposition. The applicability of res ipsa loquitur, for which plaintiff contends, relates entirely to the over-heating of the engine wheels which occurred long after the jolting and jarring charged in the complaint and had no relation whatever to the alleged cause of plaintiff's injury. There was no occasion for including this doctrine in the charge to the jury.

Instruction 20, relating to the degree of care required of defendant in operating the train, states a correct principle of law, and it is fundamental that each party has the right to have the jury instructed on its theory of the case if it has a basis in the evidence upon which to rest. Goldschmidt v. Chicago Transit Authority, 335 Ill. App. 461.

Finding no reversible error, we are of opinion that the judgment of the Circuit Court should be affirmed, and it is so ordered.

Judgment affirmed.

Scanlan and Sullivan, JJ., concur.

44610

ARTHUR RICHARD, Appellee,	)	
	)	APPEAL FROM MUNICIPAL
v.	)	
	)	COURT OF CHICAGO.
KATIE KEYES, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in forcible detainer brought by plaintiff, Arthur Richard, against defendant, Katie Keyes, for possession of the premises described as 613 East 33rd street, third floor, Chicago, Illinois. A jury was waived and the cause was tried by the court. There was a finding that the right of possession of the premises was in plaintiff and that defendant was unlawfully withholding from plaintiff the possession thereof. Judgment was entered upon the finding and a writ of restitution was ordered. Defendant appeals.

No point is raised on the pleadings.

Plaintiff's theory is that he is the landlord of the premises in question, which he desires in good faith for his own immediate use and occupancy; that he properly served a thirty days' notice of termination of the tenancy upon defendant; that her month to month tenancy terminated on March 31, 1948, and that plaintiff is entitled to possession of the premises.

Defendant states her theory as follows: "That each month since 1939 she paid monthly rent for month ending on the first day of each month and that the 30 days Notice of Termination of tenancy expiring on the 31st day of the

month could not have the effect of terminating her month to month tenancy when her rent was paid for month ending on the first day of the month. That when plaintiff took over the building in question, December 1, 1946, he took same with notice of defendant's tenancy, and was not entitled to possession of the apartment of defendant for his own use as a landlord in good faith, when he was only a tenant with notice of defendant's rights, under the Federal Housing and Rent Act."

Plaintiff, the landlord of the building in question, acquired control of the building in 1946 under a ten year lease from the owner, and defendant has been paying rent to plaintiff since that time under a month to month tenancy. On February 3, 1948, plaintiff served defendant with a notice terminating her tenancy on March 31, 1948, for the reason that he needed the apartment for his own immediate use. It appears therefore that plaintiff, instead of giving defendant the thirty days' minimum notice required by the statute, gave her fifty-seven days' notice.

Defendant contends that "where tenancy from month to month ends on the first day of the month, a 30 days' notice to terminate tenancy, expiring on the 31st day of the month and demanding possession of the premises on the 31st day of the month does not terminate the tenancy for reason that tenant has the right of possession until midnight of the first day of the month and landlord has no right to demand possession until the expiration of that time." This contention is based upon the assumption that "there is a total absence of any evidence in the record

tending to show that the defendant's tenancy from month to month ended on the 31st day of the month." Plaintiff testified that defendant was a month to month tenant "from the first to the 31st." Defendant testified in her own behalf but did not contradict this testimony of plaintiff. In Necros v. Tedtman, 238 Ill. App. 220, 223, it is stated that the general rule that a tenancy from month to month expires at midnight on the last day of the month and the notice should call for the vacation of the premises on that day, although the tenant has the right of occupancy to the very end at midnight and the landlord the right of occupancy on the next day. This rule is followed in Hoefler v. Erickson, 331 Ill. App. 577.

Defendant introduced certain rent receipts given by plaintiff to defendant, which read, "from the 1st to the 1st," and argues that these receipts prove that defendant's tenancy from month to month did not end until midnight of the first day of the month. As the rent for the premises was due on the 1st of the month in advance, the term of the month to month tenancy began on the 1st. If defendant's strained interpretation of the language of the receipts is correct, it would mean that the tenancy was for more than a month. Defendant seeks to avoid this dilemma by contending that under a "well settled rule of law in this state in computing time the first day is excluded and the last day included," and that by applying this rule to the instant case "we must reach the conclusion that defendant's rent was paid to and including the first

day of each month and that defendant was entitled to possession of the premises until midnight of April 1, 1948, and that the notice served on defendant was ineffectual to terminate the tenancy on March 31, 1948." We think that when the language of the receipts is given its natural meaning it does not support defendant's argument that she was entitled to possession of the premises until midnight of April 1, 1948. When the facts in the case are considered in the light of the law that we have cited it seems clear that the trial court was justified in finding that the month to month tenancy of defendant expired at midnight on March 31, 1948. As the tenancy here began on the first day of the month, and as it was a month to month tenancy, it ended on the last day of the month.

Defendant contends that it was incumbent upon plaintiff to prove by a preponderance of the evidence that he seeks in good faith to recover possession of the apartment in question for his own use and occupation and that he failed to successfully carry the burden. Plaintiff is justified in contending that defendant in arguing this contention has not adhered to the record, and that misstatements of the evidence are frequently made. The trial judge stated that he was satisfied from the evidence that plaintiff was seeking in good faith to recover possession of the apartment for his own use and occupation, and after a careful examination of the evidence that bears upon the instant contention we are satisfied that the conclusion of the trial judge was fully justified by the evidence.

The attorney for defendant, by his resourcefulness, has enabled her to withhold possession of the premises in question from plaintiff for over eighteen months.

The judgment of the Municipal court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

In the

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

- - - - - - - -

May Term, 1949.

- - - - - - - -

1443

Term No. 49M4 Agenda No. 10

WYLIE A. HAMILTON, Plaintiff-Appellee, -vs- W. W. TOLER, doing business as W. W. TOLER & SON, Defendant-Appellant.	Appeal from the Circuit Court of Wayne County, Ill. Hon. Charles T. Randolph, Judge, Presiding

- - - - - - - - 338 I.A. 656

Scheineman, J.

In an action for damages for personal injuries arising out of a highway collision, judgment was entered against the defendant, W. W. Toler, upon a verdict in favor of the plaintiff, Wylie A. Hamilton, for $7,000.00, from which the defendant appeals.

The collision occurred in daylight in the Village of Cisne, Wayne County, on U. S. Highway 45, which is paved to a width of eighteen feet. In the Village, the road makes an abrupt right angle turn. Plaintiff, driving a Ford Sedan, approached the curve from the east to turn to his right and proceed north, so that he was on the inside lane of the curve. Defendant's truck, driven by his agent and servant, approached the curve from the north to turn left and proceed east, thus was on the outer lane. The drivers met and attempted to pass on this curve, when the collision occurred, resulting in personal injuries to plaintiff.

The plaintiff charges that he proceeded around the

curve using due care and caution, and, in substance, that the defendant's driver negligently cut the corner, so that the rear of the truck crowded well over into plaintiff's lane and there the truck's rear wheels collided with the left front portion of the Ford. Defendant's answer denies all this and further alleges the collision was caused by plaintiff's negligence, that plaintiff operated at an excessive speed and struck the curve at forty miles per hour, that by reason of his careless and negligent operation, plaintiff was unable to "control his car and keep it in the proper traffic lane" etc. Plaintiff replied, denying the new matter.

The principal contention of the defense is that plaintiff failed to prove due care on his own part, on the contrary, that the established facts show the collision was his fault, and the trial court should have directed a verdict. A proper motion for directed verdict was filed, also a motion for new trial, which likewise includes a claim that there is no substantial evidence tending to support the verdict. It is therefore necessary to make a brief reference to the testimony.

The plaintiff, and four other witnesses who were passengers in the Ford, all testify that plaintiff was proceeding at a slow speed in approaching the curve, that he further decreased his speed at the curve. Various estimates are given but all agree that his speed did not exceed 15 miles per hour as he made the turn. All of them testify that plaintiff remained in his own lane at all times, all of them saw the truck when they were about 100 feet from it, and that in passing, plaintiff drove as far to the right as possible without getting off the paved traffic lane. Furthermore, all of them agree in substance, that the defendant's truck cut the corner, that the rear end swung over the black line, into plaintiff's lane and sideswiped

the Ford, striking the left front.

Defendant's truck, weighing 20,000 pounds, and loaded with 30,000 pounds, was about 32 feet long, with a wheel base of 26 feet. It was not a tractor and semi-trailer, but a dual tandem, with two wheels in front and eight in the rear. The driver claims the impact occurred as he was coming out of the curve, that the left wheels of the Ford were on the black line, as were his own left rear wheels. But he admits the rear of the truck swung over the black line, that it had to be, in making that curve with that long piece of equipment.

He further says that after the collision, the plaintiff told him: "I looked up and saw that big cat and got excited". This is denied by the four passengers in the car, and plaintiff says he was stunned. He was removed in an ambulance and deposited in a hospital, where he remained for twenty days.

There was no testimony of excessive speed, erratic movements, or loss of control by the plaintiff. On the issues made by the pleadings, it is clear that the record presents substantial support for plaintiff's case, and very little for the defense. We have covered the substance of the whole case, to make the rest of the argument clear, though we are not actually called upon to weigh the evidence in passing upon the defendant's motions. It is an elementary rule that, on a motion for directed verdict, the court does not weigh the evidence, its inquiry is confined to the question whether there is substantial evidence from which, together with the reasonable inferences therefrom, the jury might properly find for the plaintiff. Minnis vs. Friend, 360 Ill. 328; Graham vs. Dressen, 292 Ill. App. 15; Libby McNeill & Libby vs. Cook, 222 Ill. 206. We hold that the trial court was correct in denying defendant's motions, on the evidence.

Most of the defense argument is based upon the fact that, on the inside of the curve, there was a concrete gutter, about two feet wide, with a grass shoulder beyond. It is asserted that the accident would not have happened on a straight portion of highway, and that plaintiff could have avoided it on the curve by utilizing the gutter or the shoulder; furthermore, since plaintiff saw the truck 100 feet away, and was approaching the curve at slow speed, he could have stopped short in a position of safety. Based on these premises, it is urged that plaintiff was guilty of contributory negligence as a matter of law. Cases are cited involving persons who, knowing of a dangerous condition, deliberately adopt a perilous course of action.

Such cases are not in point here. The defense has ignored the ordinary rule that due care is a question of fact for the jury, unless all reasonable minds would agree that negligence is established. Here were two vehicles meeting and passing on a two-lane road. The law requires each to stay in his own lane, and yield half the road to the other. No special privileges are conferred upon a truck, merely because it is unwieldy. We cannot amend the law to make it plaintiff's duty to yield the whole road to a truck, nor two-thirds, nor any other fraction greater than one-half.

A person has a right to presume that other parties will obey the statutes and ordinances in force in a given place. Roberts vs. Cipfl, 313 Ill. App., 373. Upon perceiving a violation of law, plaintiff was charged only with the duty to use due care. Graham vs. Dressen, 292 Ill. App., 15. Whether he did or did not use proper care under the circumstances shown by the evidence was a proper question for the jury. It could be argued to the jury that plaintiff might have gotten out of the way if he saw the danger in time, or he might have stopped in a safe place and waited

for all law violators to pass, or he might have stayed home and avoided all traffic hazards. But the law does not decide the specific requirements of his actions to constitute due care, it does not say he must do precisely this, or must not do something else. Lasko vs. Meier, 327 Ill. App., 5.

Defendant's proposition implies that one who sees an approaching vehicle encroach upon his lane, has an absolute duty to swerve to the gutter or shoulder, like a frightened horse, otherwise he cannot even have a jury pass upon his claim for damages against the law violator. This is not the law. The cases we have cited show that plaintiff was required to use the care of an ordinary prudent man, and the jury must decide whether he did so in this type of case.

Several other points are presented in support of the motion for new trial: that the verdict is excessive, that the court admitted improper medical testimony and improperly instructed the jury.

The plaintiff testified that he received a severe chest injury in the accident, that he was in the hospital for twenty days, and confined to bed at home continuously for a month thereafter, that he had been employed as a guard in a prison prior to the injury and was then in good health, guarded cells, served as fire chaser and other active duties. He returned to work about three months after the injury, but did only duty as guard in a tower, where he could sit out his eight hours, a job for a man incapable of more violent exercise; and even then he had severe pain in his head, chest and arms, spent fourteen hours a day in bed, and after six months gave up the job entirely. While in the hospital, for days he vomited blood. He is still bothered by the chest and arm pains, and has a large depression in the sternum about two to three inches long.

A physician testified to examinations recently made, including X-ray pictures, and that they showed the severe damage to the sternum, healed fractures to ribs at the juncture therewith, and a greatly enlarged heart. The patient also had high blood pressure. He stated there is no remedy for the chest injury, and it is permanent.

It is clear from the foregoing, that there was evidence from which the jury could find that this plaintiff was injured in the accident, that the injuries affected his capacity to work, and that they were permanent. In view of this, we are unable to say that the verdict of $7000.00 was excessive.

A number of objections were made to the physician's testimony, on the ground his examinations were made years after the occurrence, and were too remote. This objection is without merit. The plaintiff had a right to present medical corroboration of the continued existence of his injuries, and as to their permanent nature. The trial court did not permit the doctor to conjecture about the cause of the injuries. The testimony was limited to a description of objective symptoms, plus an expert opinion as to which were the result of trauma, and which might result from age or other causes; high blood pressure was placed in the latter category. In our opinion, the court's rulings on this evidence were entirely correct.

The only plaintiff's instruction objected to by the appellant is the stock form on damages commonly used in personal injury cases. Appellant contends it permits conjecture as to duration of injuries and pain and suffering in the future. On the contrary, this stock instruction repeatedly cautions the jury to confine its consideration to the evidence; all the enumerated elements end with the words, "if any shown by the evidence," and the form finally

concludes by requiring that the damages be "proved by the preponderance of the evidence." This is an approved form. Wolfstein vs. Ill. Power & Light Co., 254 Ill. App., 362; Graham vs. Dressen, 292 Ill. App., 15.

Objection is also made that the court refused an instruction tendered by defendant, on the subject of due care of plaintiff, and which directed a verdict for defendant if, from lack of such care, the plaintiff did not have proper control, and thereby did not pass to the right, etc. The instruction was somewhat argumentative in form, but aside from that, we find the court gave, at defendant's request, no less than nine (9) instructions on the subject of due care, informing the jury in various ways that plaintiff could not recover in its absence. This was already excessive, so it could not be error to refuse this one.

The rulings of the court were correct, the judgment was properly entered on the verdict, and it is affirmed.

Judgment Affirmed.

Bardens, P. J. and Culbertson, J. Concur.

(Publish Abstract only)

44622

LOUIS J. SHUDNOW, d/b/a RELIABLE SKEE BALL COMPANY, Appellant, v. CITY OF CHICAGO, a Municipal Corporation and MARTIN H. KENNELLY, Mayor of the City of Chicago; JOHN C. PRENDERGAST, Commissioner of Police in the City of Chicago, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint for a declaratory judgment, seeking a determination by the court as to whether the device manufactured by him, known as Skee Ball Alley, a particular description of which is stated in the complaint, is in violation of the ordinances of the City of Chicago, Chapter 193 of the Municipal Code of Chicago. An answer was filed by the defendants, and upon a hearing by the court the complaint was dismissed.

It is urged by plaintiff that his particular machine is not within the prohibition of the ordinances; that the operation of the machine involves only skill; and that there is no element of chance nor is any reward, gain or prize provided for in the operation of the machine.

The questions here argued, based upon the evidence in the record, are similar to those in Levins, et al. v.

City of Chicago, 296 Ill. App. 645 (Abst.), wherein this court held this type of machine to be within the terms of the ordinances referred to, and reversed an injunction issued by the chancellor, restraining their enforcement. This plaintiff also filed a complaint against the City of Chicago to restrain the City from interfering with the sale and operation of the identical machine involved in the instant case. Coleman-Shudnow v. City of Chicago, 297 Ill. App.130. This court (Third Division) reversed the injunction order obtained by this plaintiff against the City of Chicago and quoted with approval Levins v. City of Chicago, supra. The holdings in Levins v. City of Chicago and Shudnow v. City of Chicago, supra, are controlling in this case.

The judgment of the Superior Court is accordingly affirmed.

AFFIRMED.

Tuohy, P. J., and Niemeyer, J., concur.

44847

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff - Defendant in Error, v. WALTER LISS, Defendant - Plaintiff in Error.	WRIT OF ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Walter Liss, was tried in the Municipal Court of Chicago by the court without a jury on an information charging that he carried concealed on or about his person a German Luger automatic pistol, in violation of paragraph 155 of chapter 38 Illinois Revised Statutes of 1945. Upon being found guilty the court sentenced him to the House of Correction for a period of six months, and he prosecutes this writ of error to reverse the judgment.

Shortly after midnight on February 28, 1949, Albert J. Heitman, a police officer of the City of Chicago, observed a four-door sedan automobile, driven by defendant run through a red traffic light signal at the intersection of Archer and Kedzie avenues in the City of Chicago. After pursuing the automobile a short distance he overtook it. Accompanying the defendant was one William Wilczynski who was riding in the front seat beside defendant. Upon searching the automobile Officer Heitman found a German Luger automatic pistol underneath the front seat midway between defendant and Wilczynski. The clearance between the bottom of the front seat and the floor of the automobile was about three inches and according to Officer Heitman the gun here

involved was lying in this opening midway between defendant and Wilczynski on the floor of the car about six inches back from the front of the seat.

Defendant testified that he borrowed the automobile "from a girl friend"; that he did not place the gun under the seat; that he had never seen it before, and disclaimed ownership.

Wilczynski, called in behalf of defendant, denied any knowledge of the presence of the gun in the automobile and also the ownership thereof.

Defendant Liss contends that the proof fails to show that the pistol was in such proximity as to be within his reach while he was driving the automobile. In support of his contention defendant relies on People v. Niemoth, 322 Ill. 51. In that case it appears that Niemoth was driving the automobile and the firearms were found on the floor back of the front seat where they were not immediately accessible to the accused. The facts in the Niemoth case are readily distinguishable from those in this case. In the instant case we think the court could find that the gun was within the reach of the defendant without materially changing his position at the steering wheel. See Spears v. State, 17 S. W. (2d) 809.

Defendant insists that there was no proof tending to show that the gun found in the automobile belonged to him. From a reading of the statute, paragraph 155, Chapter 38 Illinois Revised Statutes 1945, we find no provision requiring proof of ownership of the firearm.

Finally defendant maintains that the evidence fails to show that he had any knowledge of the presence of the pistol in the automobile. He argues: "The pistol having

been found under the seat of the automobile equi-distant from the defendant and another occupant William Wilczynski, it is impossible to determine 'on or about which of the two persons the gun was concealed,' " citing People v. v. Henneman, 367 Ill. 151. In the Henneman case one Dungan, the owner, was arrested while driving his automobile accompanied by Henneman who was seated beside him. After a search two guns were found in a compartment in the dash of the automobile. Henneman disclaimed ownership of the guns and knowledge of their presence in the compartment. The court held (p. 153) that "there was not a legal arrest as background for the search made by the officers. The discovery of a pistol or revolver on search following the arrest cannot relate back to and operate as a justification for the arrest. The arrest must be legal or the search is illegal." In the case at bar the legality of defendant's arrest is not challenged nor the search which followed. Defendant testified that he "borrowed the automobile from his 'girl friend.'" She did not appear as a witness. It is undisputed that defendant had control of the automobile and constructive possession of its contents, including the pistol. Whether defendant knew of its concealment under the front seat, we think, presented a question of fact for the court. (People v. McMahon, 359 Ill. 97.) See People v. Bellucci, 240 NYS 669. The trial judge who saw and heard the witnesses was in a better position to determine the credibility of the witnesses and the weight of their testimony than this court, and we are, therefore, not disposed to disturb the judgment.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

44699

BEATRICE FEDRO, Guardian of the Estate of JEROME THOMAS WAUGH, a Minor, Appellant, v. MARGARET E. WAUGH, individually and as Executrix of the Last Will and Testament of THOMAS G. WAUGH, deceased, and Margaret E. Waugh, as Trustee, et al., Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Beatrice Fedro and Thomas G. Waugh were married at Springfield, Illinois, on December 25, 1932. A son, baptized Jerome Thomas Waugh, born on February 6, 1936, was the only child of that marriage. On October 24, 1939, Thomas G. Waugh, as settlor, by a revocable trust agreement, delivered certain assets to Myles Monahan, as trustee. Jerome Thomas Waugh was one of the beneficiaries named in the trust. On February 5, 1940 a complaint for divorce was filed by Beatrice Waugh against Thomas G. Waugh. On March 30, 1940 an amended complaint was filed therein. On June 19, 1940 a decree severing the bonds of matrimony between the parties was entered. The decree ordered the defendant therein to pay to plaintiff therein the sum of $5,000 as alimony, awarded the custody of Jerome to plaintiff, directed defendant to pay to plaintiff the sum of $90 per month for Jerome's support and gave certain directions regarding the trust in favor of Jerome.

On or about December 2, 1940 the settlor revoked the trust agreement in accordance with its provisions. On October 2, 1945, Thomas G. Waugh having remarried, made his last will and testament naming Margaret E. Waugh, his wife, as executrix and trustee. On May 17, 1947 Thomas G. Waugh died. The will was admitted to probate on July 28, 1947 and letters testamentary issued to Margaret E. Waugh, his widow. On March 30, 1948, Beatrice Fedro, the mother of Jerome Thomas Waugh, a minor, on behalf of and as the guardian of his estate, filed a complaint for specific performance in the Circuit Court of Cook County against Margaret E. Waugh, individually and as executrix and trustee under the last will and testament of Thomas G. Waugh, deceased, and others. Margaret E. Waugh, in her various capacities, filed a motion to dismiss on the ground that the relief prayed could not be granted because the matters sought to be adjudicated had been previously decided in litigation between the parties, and she supported her motion with certain documents. The court entered a decree dismissing the complaint for specific performance because "the matters contained therein are res judicata." Plaintiff, as guardian of the estate of Jerome Thomas Waugh, a minor, appeals and asks that the decree be reversed and that a decree be entered in accordance with the prayer of her complaint.

Plaintiff asks that the trust agreement of October 24, 1939 be enforced, and that defendant be decreed to "segregate and assign sufficient assets out of the estate of the said Thomas G. Waugh, deceased," for the use and benefit of Jerome Thomas Waugh, a minor, to comply with the terms of the trust agreement. Plaintiff maintains that the agreement was between her and Thomas G. Waugh, deceased, for the benefit of the minor. Under the trust agreement the minor, after the death of Thomas G. Waugh, would receive 50% of the net income from a certain part of the trust estate, and on the minor becoming 25 years of age, his father having died, he would receive the corpus of the trust estate so set aside for him. The settlor retained the right to alter, amend or revoke the agreement. The will named Jerome Thomas Waugh a beneficiary to the extent of 10% of the estate, to be held in trust until he reached the age of 25 years. Plaintiff relies on a clause of the divorce decree enjoining Thomas G. Waugh, Myles Monahan and others from changing, modifying or abridging the rights of the minor child under the trust agreement "wherein the said minor child of the parties hereto was granted in trust one-half of the property of the said Thomas Girard Waugh, defendant herein, and it is further ordered that in the event the said agreement shall be modified, abridged or cancelled by operation of law, or otherwise, that the said rights of the minor child be conserved in any future or other agreement, or other proceedings had in lieu thereof, or in substitution thereof to the same percentage as in said trust agreement."

The motion of defendant to dismiss, filed September 3, 1948, asserts that on May 23, 1941, plaintiff filed a petition in the case in which the divorce decree had been entered, for a rule to show cause why the defendant therein, Thomas G. Waugh, should not be punished for contempt for failing, refusing and neglecting to comply with that decree. This petition, a copy of which was attached to defendant's motion, alleges wilful failure of the boy's father to carry out the order of the court with respect to the trust in favor of his son. The failure alleged amounted to a revocation or abandonment of the trust. Plaintiff asked that the trustee be removed and that an impartial trustee be appointed to administer the trust. The answer of Thomas G. Waugh, filed April 28, 1942, a copy of which is also attached to defendant's motion, stated that the rights of the minor had not been modified or abridged as under the terms of the trust agreement no rights accrued to the child until the death of his father; that under the terms of the agreement the settlor retained the net income until his death, or until the trust estate is distributed; that under the terms of the trust agreement he, the father, had the power of revocation; and that in the will he made adequate provision for the support of his child in the event that he, the father, died, "far in excess of the amount which said minor child would have received from any benefits under the trust agreement."

Defendant also attached to the motion to dismiss a copy of the decree disposing of plaintiff's petition for a rule to show cause. That decree shows that the chancellor appointed an attorney as guardian ad litem for the minor. The guardian ad litem acted as his own attorney and appeared in behalf of the minor. The decree found that on December 2, 1940 Myles Monahan resigned as trustee and that Thomas G. Waugh revoked the trust agreement in accordance with its provisions; that the trust agreement provided for the support of the minor after the death of his father; that there is nothing in the divorce decree that the father is under obligation to his son after the father's death; that the court "is without jurisdiction to enforce the decree," insofar as it relates to the trust agreement "as said trust agreement is not for the support of said minor child during the lifetime of said Thomas G. Waugh"; that the decree makes adequate provision for the support of the minor child; that the trust agreement was "terminated by the act of said trustee and the court has no authority over the said Thomas G. Waugh to order him to execute a will or trust agreement compelling the said Thomas G. Waugh to devise or give anything to said minor child"; that "as a matter of law the responsibility for the support of the minor child ends with the death of said Thomas G. Waugh"; and that the said Myles Monahan and Thomas G. Waugh are not in contempt. The decree concluded by dismissing the petition at plaintiff's costs.

Plaintiff maintains that the doctrine of res judicata is not applicable because the court did not have jurisdiction. We cannot agree with plaintiff. The court had jurisdiction of the subject matter and of the parties. The petition to enforce the trust was brought by the minor by his next friend. The court sought to further protect the interest of the minor by appointing a guardian ad litem. It will be observed that the complaint in the instant case was filed by the mother as guardian of the estate of the minor and that she filed the previous petition as next friend of the minor. She did everything in her power to protect the minor's interest in the petition filed in the divorce case as well as in the instant case. A reading of the exhibits attached to the motion to dismiss shows that the proceeding to enforce the trust provision of the divorce decree necessarily involved a decision of the same issue as the instant case. There it appeared that the trust had been revoked and it was sought to keep it alive and to enforce it. That is the relief sought in the present case. Plaintiff's brief states that he relies upon an agreement made for his benefit between his mother and father. The only agreement alleged is the one stated in the divorce decree.

Plaintiff states that a minor cannot be treated as a party to a suit unless served with process. The petition was filed by the infant by his mother as his next friend. Sec. 5, Ch. 22, Ill. Rev. Stat. 1947, provides that suits in chancery may be commenced and prosecuted by infants either by guardian or next friend. In Chudleigh v. C. R. I. & P.

Ry. Co., 51 Ill. App. 491, the court gives a history of the practice of a minor appearing by next friend. Theoretically, such a person is appointed by the court. It is generally held, however, that no formal order is necessary, the admission of the next friend by the court being implied. Paskewie v. East St. Louis & Sub. Ry. Co., 197 Ill. App. 1; 43 C. J. S. p. 285.

In our opinion plaintiff is attempting to relitigate the issue previously settled. No appeal was taken from the decree entered at that time. We find that the decree then entered settled the issue now attempted to be raised and is an effectual bar to the present action and that the chancellor was right in so deciding. Therefore, the decree of October 27, 1948 of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

44798

THE TRUST COMPANY OF CHICAGO, as Conservator of the Estate of Ethel Berman, Incompetent,	)	APPEAL FROM
Plaintiff - Appellant,	)	SUPERIOR COURT
v.	)	COOK COUNTY.
MYRTLE SALOMAN,	)	
Defendant - Appellee.	)	

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

William Berman and Ethel Berman were married on June 9, 1923. A son, Aubrey, born May 23, 1925, was the only child of the parties. Ethel and William lived together as husband and wife in a harmonious relationship until August 5, 1942, when she became mentally ill. She is suffering from dementia praecox, paranoia type. She was adjudged insane and by order of the County Court was committed for care to the Elgin State Hospital. Prior to his marriage William took out a 20 year payment life insurance policy for $2,000 in the New York Life Insurance Company. Under the policy the insured might at any time and from time to time change the beneficiary. On June 10, 1923, after his marriage he made his wife the beneficiary. On December 23, 1946, he named Myrtle Saloman beneficiary in place of his wife Ethel. William died on June 27, 1947.

On July 18, 1947, The Trust Company of Chicago, as Conservator of the Estate of Ethel Berman, Incompetent, filed a complaint in chancery against the New York Life Insurance Company and Myrtle Saloman, alleging that by virtue of the undue influence which Myrtle Saloman wielded over William

and in fraud of the rights of Ethel, the defendant, Myrtle Saloman, procured William to remove Ethel as beneficiary under the insurance policy and had herself substituted as the beneficiary. Plaintiff prayed that the transfer of the policy to Myrtle Saloman be adjudicated a fraud on the rights of Ethel and of no effect, that the insurance company be enjoined from paying the proceeds of the policy to Myrtle Saloman; and that the court order that the proceeds be paid to plaintiff. Myrtle Saloman filed an answer admitting the marriage, denying that William ever came under her influence, that the changing of the beneficiary in the policy resulted from any undue influence on her part, or that she was guilty of any fraud with respect to the rights of Ethel. The New York Life Insurance Company filed its answer and counter-claim in the nature of a bill of interpleader. From this it appeared that after deducting the amount of a loan which had been made to the insured, the total death benefit proceeds of the policy was $1,890.66. An interlocutory decree was entered directing the insurance company to pay to the clerk of the court the sum of $1,885.66, the insurance company having been allowed its appearance fee. The insurance company was then dismissed from the suit. The cause was referred to a master in chancery, who took and reported the evidence with his conclusions of law and fact, and recommended that a decree be entered requiring the clerk to pay the amount on deposit to Myrtle Saloman. Objections to the master's report were overruled and ordered to stand as exceptions. After a hearing on the exceptions and on

additional objections of the plaintiff to the master's supplemental report, a decree was entered as recommended by the master. Plaintiff, appealing, asks that the decree be reversed and that the cause be remanded with directions to award the money to plaintiff, and that it be exonerated from any obligation to pay costs.

The hearing before the master was upon the original complaint alleging undue influence and fraud, and upon the answer of defendant denying these charges. On October 27, 1948, after hearings before the master had been completed, on motion of plaintiff to file an amended and supplemental complaint, opposed by defendant, an order was entered giving plaintiff leave to file its motion and continuing the motion until the hearing on the exceptions to the master. Plaintiff, however, filed its amended and supplemental complaint with the clerk. On January 21, 1949, an order was entered overruling the exceptions to the master's report. On January 25, 1949, preceding the entry of the decree, an order was entered permitting plaintiff to file its amended and supplemental complaint, the answer theretofore filed by the defendant to the original complaint to stand as a general denial to the amended and supplemental complaint. Plaintiff did not then or at any time thereafter file an amended and supplemental complaint, nor was any order entered permitting plaintiff to refile the amended and supplemental complaint which it had filed on October 27, 1948. Defendant urges that inasmuch as the amended and supplemental complaint permitted by the order of January 25, 1949, was never filed,

or an order entered permitting this pleading to be refiled, such amended and supplemental complaint should not receive any consideration on this appeal. Defendant does not claim to have been surprised or prejudiced because the amended and supplemental complaint was filed in the manner complained of. We regard defendant's objection as hypercritical.

Plaintiff maintains that the evidence clearly establishes that a fiduciary relationship existed between defendant and William Berman in which she was the dominant party, and that under the rule laid down in Beach v. Wilton, 244 Ill. 413, the assignment to defendant should be nullified and the proceeds of the policy paid to plaintiff. We are of the opinion that the burden of proving facts from which a confidential or fiduciary relationship arose rested upon plaintiff. In Stewart v. Sunagel, 394 Ill. 209, the court said that "the burden of proving facts from which a confidential or fiduciary relationship arises rests upon the parties seeking to set aside a conveyance. To establish the relationship by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion. (McGlaughlin v. Pickerel, 381 Ill. 574; Johnson v. Lane, 369 Ill. 135.) With respect to undue influence sufficient to require setting aside a deed, the undue influence must go to the extent of depriving the grantor of his free agency and must operate at the time of the transaction sought to be impeached." We have considered plaintiff's contention that on an interpleader each

claimant comes in as if a plaintiff in a possessory action and must affirmatively establish his right. In the instant case it would be the duty of the insurance company, on the basis of the documents in its possession, if no adverse claim had been made by plaintiff, to pay the proceeds of the policy to defendant. There was no dispute that an assignment had been made to her. Plaintiff contends, for the reasons set forth in the amended and supplemental complaint, that this assignment was invalid. We are of the opinion that plaintiff must recover on the case made in the amended and supplemental complaint and that it had the burden of proving its allegations.

At the time of their marriage William was a post-office clerk. Thereafter he went to work for the St. Paul Railroad as a clerk and continued in that job for the rest of his life. His earnings during most of his married life averaged from $30 to $35 a week. At the time of his death the rate of pay was about $50 a week. The only savings he accumulated were a few hundred dollars in war bonds. He lived with his family in small rented apartments. During the last period of his life, from about the time of his wife's confinement in the asylum until his death, he lived in a four room apartment on the third floor above a high English basement on the north side of Chicago. At the time of his death he was 49 years and 11 months old. At that time his wife was about 47 years old. Defendant came to the Elgin State Hospital in the fall of 1942 as a voluntary

patient. She became acquainted with Ethel Berman. On an occasion when William was visiting his wife, defendant was introduced to him by his wife. Defendant passed a civil service examination for a secretarial position vacancy and became an employee of the Department of Public Welfare as a clerk and secretary for the physician who was attending Ethel. She had access to the files and records relating to Ethel. One day when William wanted information about the case she suggested that they meet at dinner, and this meeting, at which she undertook to give special attention to Ethel's case, was the beginning of their personal relationship. William and defendant became close friends. The master found that after Ethel was committed to the asylum William lived with his son in the apartment until February, 1943, when his son entered the University of Illinois; that thereafter William lived alone; and that in June, 1943, the son was inducted into the United States Army, where he remained until April, 1946. After an honorable discharge the son returned home, but left in June, 1946, to return to the university, where he remained until his father's death. Defendant became friendly with the Bermans. On many occasions she went shopping with him and had dinner with him. They attended moving pictures. They often discussed Ethel's ailments. Defendant took special interest in consulting the physician at the hospital concerning special treatments for Ethel. After December, 1944, defendant lived in Chicago and was frequently in William's company. Early in 1946 William was treated by defendant's physician. William was suffering

from high blood pressure and kidney disease. In April, 1946, he was hospitalized. Thereafter he returned to his home and was under defendant's care. In order to better care for him in his illness she took a three week leave of absence from her employment. On June 1, 1946, William returned to work, although remaining under a physician's care. He worked until early in June, 1947, shortly before he died.

The master found that William had two life insurance policies, each for $2,000, both payable to his wife as beneficiary; that defendant owned a life insurance policy for $2,500, payable to her brother as beneficiary; that from the time defendant and William first met they became very friendly and had come to rely on and consult each other about their personal affairs and problems; that defendant cooked for him, cleaned his apartment, accompanied him socially and nursed him during his serious illness; that on December 23, 1946, while still under a physician's care, William sent for an agent of the insurance company and told him he would like to leave defendant some money and that his son no longer seemed to care for him; that William changed the beneficiary on one policy to defendant and on another policy to his son; that on February 18, 1947, defendant changed the beneficiary on her policy so that her brother and William were beneficiaries to the extent of $1,250 each; that William was a mild mannered man, easy going, polite, accommodating and not given to argument; that during the last years of his life he was not intimate with his wife's relatives and did not confide in or discuss his personal

matters with them or with his own relatives; that in addition to the policy in suit William had another policy of $1,000 on which Ethel was beneficiary, the proceeds of which were paid to plaintiff; that plaintiff received $300 from the Brotherhood of Railroad Clerks and $377.52 from the Treasurer of the United States; that a Masonic life insurance policy was sufficient only to pay burial expenses; and that he left no other property except household furniture and several hundred dollars in war bonds. The Master also found that William did not name defendant as beneficiary under the policy by virtue of any undue influence practiced by defendant, but because of his own free will and accord; that no evidence was introduced to prove that defendant procured William to remove Ethel as beneficiary in fraud of the rights of Ethel; and that the act of changing the beneficiary was the free and voluntary act of William. The Master stating that he did not agree with plaintiff's contention that there was a fiduciary relationship between William and defendant, found that William was not unduly influenced by defendant, and that she did not betray any confidence reposed in her and that she proved the fairness of William's act in naming her as beneficiary.

There is no contention that William Berman was incompetent. The evidence shows that he was fully competent to make decisions. Ethel Berman had no more than an expectancy in the insurance policy, which could be revoked by the insured at will. Plaintiff argues that there was

patent confusion in the mind of William when he made the assignment to his son in that while he said he was angry with his son, he vented his anger by substituting him as the beneficiary in place of Ethel. The statement is made in the briefs that the policy assigned to the son was paid to him without contest. We cannot understand how the ill feeling said to have been expressed by the father toward the son could affect the right of defendant to receive the amount assigned to her. We have read the transcript of the testimony. The master's findings and conclusions were approved by the chancellor and we do not feel that we would be justified in disturbing them.

Plaintiff asserts that it is the public policy of the state to protect and care for the insane through its judicial, administrative and legislative arms; that the relationship between the state as parens patriae and the insane persons whom it undertakes to protect and care for is a fiduciary one; that there is a positive duty on all agencies and employees of the state dealing with the insane to protect and defend their rights, including their property rights; that defendant, as an employee of the Department of Public Welfare of the State which had personal custody of Ethel Berman, and as a voluntary adviser of William with regard to the welfare of Ethel, bore in law and in fact a confidential and fiduciary relationship to Ethel; that it is against public policy and good morals for her to profit by the relationship and obtain the proceeds of the insurance policy at the expense of Ethel;

that defendant, as an employee of the Department of Public Welfare of the State, is prohibited by public policy from obtaining financial benefit at the expense of her employer, the People of the State of Illinois; that since under the law the public is charged with the expense of comforts and conveniences for Ethel if her estate is not adequate, it was the duty of defendant to her employer, the State, to augment Ethel's estate, and not to divert money to herself from the estate, whence it could be used to relieve the public burden; that principles of natural justice demand that such employees exercise the highest degree of good faith for the rights and interests of their helpless wards; that anything which in the slightest degree subjects them to temptation to swerve from the path of duty is inadmissible; and that it would be against public policy to allow an employee of a state insane asylum to enter into a relation of affection with the spouse of an inmate of the asylum, and during the course of such relationship to cause such spouse to remove the inmate as a beneficiary on the policy and take the benefits of the policy for herself, because such a transaction is essentially immoral, unethical and tends to destroy the confidence of the public in the state and its institutions. We do not believe that the evidence shows that the defendant used her position as an employee of the state to induce William to substitute her as the beneficiary in the policy in place of Ethel.

Finally, plaintiff maintains that the master's fees are excessive and in any event should not be charged against the estate of Ethel Berman. The master did not itemize, in his certificate of services, fees and charges, the fees to be fixed by the chancellor. Plaintiff also contends that the master's fees are unreasonable and exorbitant. We believe that under the special circumstances of this case the master's fees should be taxed against defendant. Therefore, the decree of the Superior Court of Cook County is modified to the extent only that the fees of the master in chancery are retaxed against defendant, and as modified, the decree is affirmed.

DECREE AFFIRMED AS MODIFIED.

LEWE, P.J. AND KILEY, J. CONCUR.

44810

IRVING M. NOVACK, Plaintiff - Appellee, v. CASUAL-CRAFT, INC., an Illinois corporation, Defendant - Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Irving M. Novack filed a complaint in the Superior Court of Cook County against Casual-Craft, Inc., to recover commissions allegedly earned under an agreement to sell ladies' garments. Issue having been joined, a jury returned a verdict in favor of plaintiff for $2,748.48. Motions by defendant for a directed verdict, judgment notwithstanding the verdict and a new trial were overruled, and judgment was entered on the verdict. Defendant appeals.

Defendant manufactures ladies' garments at Chicago. Its capital stock is owned by Morris Rubin and Irma Rubin, husband and wife. Plaintiff, a traveling salesman of ladies' garments, has followed that occupation for 31 years. In the fall of 1943 defendant employed the plaintiff to sell some of its products in certain southwestern states, comprising what the parties call the "southwestern territory". Plaintiff was to receive a commission of 8% on net sales made in the territory and a drawing account against prospective commissions of $75 a week. Nothing was said at the time of employment as to its duration. He worked for defendant during the years 1943, 1944,

1945 and part of 1946. Defendant's merchandise is sold in seasonal lines. Showing of defendant's line for the fall 1946 season was to open at Kansas City, Missouri, on May 9, 1946. On May 4, 1946, defendant advised plaintiff that it would not allow him to represent it any longer. Defendant refused to send plaintiff any samples for the fall season and he did not have any 1946 fall samples to display to prospective buyers. A stipulation was read to the jury that the records of defendant show that the net sales made in the southwestern territory of the 1946 fall line amounted to $34,356.00. Defendant urges that since there was no agreement as to how long plaintiff's employment would last, it was terminable at the pleasure of either party without liability for breach of contract. Plaintiff replies that defendant employed him to sell its fall 1946 line; that his services resulted in substantial sales of this line; that he is entitled to a commission on the sales; that the testimony establishes that he represented defendant in the sale of its fall 1946 line; and that the reasons assigned by defendant for his discharge are obvious fabrications. There is no dispute that at the time plaintiff was employed nothing was said of the duration of his employment. The parties also agree that where there is no specification of any particular time of service, there is no hiring for a fixed period. See Odell v. Chicago Great Western R. Co., 212 Ill. App. 616; and White v. American Electric Fusion Corp. et al., 328 Ill. App. 128, (abst.) and cases there cited.

We are of the opinion that from the evidence the jury could reasonably find that plaintiff was employed by defendant to represent it in the sale of its fall 1946 line; that he performed services in its behalf in connection with its fall 1946 line; that as a result of his efforts a substantial amount of merchandise was sold by defendant in the southwestern territory; that after plaintiff's services were substantially completed defendant discharged him for reasons patently false and fabricated; and that defendant then sought to reap the benefit of plaintiff's labors and to escape payment of the commissions to which he was entitled by reason of his labors.

The showing of defendant's fall 1946 line was to open at the Muelbach Hotel in Kansas City, Missouri, on May 9, 1946. Mr. Rubin, an officer of defendant, had informed plaintiff in March, 1946, that the fall line would be ready for him in that hotel on May 9th. The nature of defendant's business is such that sales work in connection with the line for any season must begin about 60 days prior to the season's opening. If a fall line is to be shown in May of a given year, buyers are visited and preliminary arrangements made for the purchase of that line in February or March of that year. Thus, plaintiff testified that it was the practice to inform buyers 60 days prior to the opening of the season as to the allotment which would be given them. The buyers would then budget themselves accordingly and arrange to have money available for the purchase of certain lines. In connection with defendant's fall 1946 line plaintiff testified that in

April, 1946 he had traveled among his customers and advertised his line as usual; that he customarily advertised his line from 30 to 60 days prior to the opening of the season; that he sent out booklets and mail informing his customers that he would have the line on display in the Muelbach Hotel on May 9th; and that he informed his customers, prospective buyers of defendant's line, that he would have the fall line ready for them at the Kansas City showing. Plaintiff's testimony as to the work done by him in these respects is not disputed. Plaintiff did not have possession of defendant's 1946 fall line, but had requested that line and had been promised that line and had informed his customers that he would have the line ready for them at the market. We agree with plaintiff that the failure to receive that line was caused by defendant. Defendant's officers, Mr. and Mrs. Rubin, knew that during the 60 day period preceding the fall showing on May 9th in Kansas City, plaintiff was working in behalf of defendant. At the time these services were rendered plaintiff was in the employ of defendant.

Certain documentary evidence also supports plaintiff's case. Letters sent by defendant to plaintiff during March and April, 1946, indicate that defendant knew plaintiff was working in his territory on defendant's fall 1946 line. Defendant inserted an advertisement in a "Buyer's Guide." This guide, entitled "Fall Fashion Market," tells about merchandise to be exhibited at the Hotel Texas, Ft. Worth, May 20-24, 1946, and announces that defendant's line is represented by plaintiff, who would be in Room 525. Defendant

made no attempt to withdraw the advertisement until May 4, 1946. Discrepancies between the statements made in letters sent by defendant to plaintiff and the testimony of the Rubins as to the reason for dispensing with his services in the territory could be and probably were considered by the jury in passing upon the credibility of the witnesses.

Defendant insists that it is clear from the evidence that plaintiff did not do any work whatsoever in connection with the fall 1946 season; that he was properly discharged on May 4, 1946, prior to the commencement of that season; and that therefore it is not liable as a matter of law. Defendant asserts that the merchandise sold during the 1946 fall season was not sold through any efforts of plaintiff, but through the efforts of the agents of defendant and that this is shown by plaintiff's own testimony. In this view defendant has reference to plaintiff's testimony that he made trips in the month of April, 1946; that he did not have defendant's 1946 line with him when he made the trips in April; that there was not a fall trip in April, 1946; that "it was a summer trip"; that he had defendant's summer line; that he did not have defendant's fall line; that the summer line consisted of summer merchandise; that he received it in March and showed it in March and April; that defendant had a summer line separate from its fall 1946 line; that in March, 1946 he sold merchandise in connection with his representation of defendant; that he "exhibited the summer line"; that in March, 1946, he did not have in his possession any fall line of defendant; that he never had in his possession the fall

line of defendant; and that he never had any samples of that line. In his testimony plaintiff stated that for the fall line "we make arrangements in February or March"; that they then go out and tell their buyers or customers what "we are going to have"; that "we would tell them 60 days prior to the opening of business what allotment we would give them"; and that "they budget themselves or have money for certain lines." We are of the opinion that the jury would be justified in deciding that there was no inconsistency in the testimony of the plaintiff. On direct examination he stated that the arrangements for the fall line were made in February or March. At the time he called on his prospective customers he did not have the samples. He expected to have the samples at the showing in the Muelbach Hotel, Kansas City, Missouri, in May, 1946. We find that his testimony is consistent with the documentary evidence and that the jury could find that the services he performed in his capacity as defendant's salesman in the territory, prior to his discharge on May 4, 1946, resulted in substantial sales of defendant's fall 1946 line for which he is entitled to commissions.

On July 10, 1946, while a controversy existed between plaintiff and defendant as to the amount due plaintiff, he received defendant's check for $328.25 with the inscription "In full payment to date." Plaintiff erased these words and cashed the check. Defendant maintains that by this action it was discharged from all liability, if any. Defendant relies on Ostrander v. Scott, 161 Ill. 339; In re Estate of Cunningham, 311 Ill. 311; and Krumrine v. Wilbur E. Howett Co.,

311 Ill. App. 243, (abst.) that if there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim, and that it makes no difference that the creditor protests, at the time, that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. The cases also hold that the creditor must either accept what is offered with the condition upon which it is offered, or refuse it, and that the fact that the words "in full" are erased from the check or receipt by the creditor does not affect the question whether the proffer and acceptance of the check constitute an accord and satisfaction, where the erasure is without the knowledge or authority of the debtor. These cases also point out that there must be an actual dispute between the parties in order to furnish a consideration for the agreement to discharge the obligation of the debtor for an amount less than the creditor claims to be due.

We find that there was competent evidence that the check so inscribed was delivered by defendant and accepted by plaintiff solely in payment of the commissions on the spring 1946 line, and that such acceptance did not affect defendant's liability for commissions due on the fall 1946 line. Defendant's clothing lines are seasonal. There was evidence that shipments of its spring line terminated on June 30th of each year, and that shipments made on July 1st and thereafter were deemed to be fall shipments. It had long been the practice for defendant

to pay plaintiff his commissions on or about the 10th day of a given month for sales made the preceding month. Plaintiff testified that "they always sent me a check the 10th of the month, of the following month, for shipments made the previous month for commissions" and that "the 10th of July I couldn't have gotten paid for shipments that were shipped in July". The controversy is concerned solely with plaintiff's commissions on the fall 1946 line. In the stipulation it is stated that the net sales made in the territory of the 1946 fall line amounted to $34,356.00. Mr. Rubin testified that the check for $328.25 dated July 10, 1946, "included everything in the spring line" and that "the check that His Honor showed me was in payment of what was due on the spring line as of that date". Under the evidence most favorable to plaintiff, his right to commissions on the fall line would not accrue until August 10, 1946. Defendant does not contend that it paid anything to plaintiff on account of the fall line commissions. Plaintiff states that if after accepting the check he had claimed he was entitled to additional commissions on the spring 1946 line, the rule of Ostrander v. Scott, supra., would defeat the claim. Plaintiff admits that the check was accepted by him in full payment of spring commissions. The check did not purport to satisfy any part of plaintiff's commissions on the fall 1946 line. Those commissions had not yet been earned.

It is not every use of the words "in full to date," or an equivalent phrase, which constitutes an accord and satisfaction in connection with the payment of a controverted

claim. In Worcester Color Co. v. Henry Wood's Sons Co., 209 Mass. 105, 92 N. E. 392, the court said (110):

"Many cases have arisen where the conditions have been such as to make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made."

In Keene v. Gauen, 22 F. (2d) 723, (CCA 5th 1927) Cert. Den. 276 U. S. 632, the court said (724):

"Where there is a single claim, and the aggregate amount is in dispute, payment of the sum conceded to be due, on condition that it shall be received in full satisfaction, bars recovery of the sum in dispute. But where there are two claims, dependent on different facts, one of which is undisputed and the other of which is disputed, the payment of the undisputed claim does not bar the right to sue for and recover on the disputed claim."

Under the evidence the jury had a right to decide that since the check was not delivered in payment of commissions claimed by plaintiff on the sale of defendant's fall 1946 line, no accord and satisfaction was created with respect to the fall commissions. The two claims are distinct and separable. Creation of an accord and satisfaction as to the spring commissions did not create an accord and satisfaction as to the fall commissions. We are satisfied that the two points discussed presented issues which were properly submitted to the jury.

The court, at plaintiff's request, instructed the jury that "If you believe that a contract of employment for the fall season was entered into between the plaintiff, Irving M. Novack, and the defendant, Casual-Craft, Inc., and that the plaintiff was wrongfully discharged by the defendant, then you may find for the plaintiff." Defendant argues that this instruction constitutes reversible error in that it is grossly misleading and left to the jury the determina-

tion of the law to be applied to the case; that there is no reference to the fall season of 1946; that the jury might come to the conclusion that if the defendant employed plaintiff for the fall season of 1944 or 1945, about which there was no dispute, the defendant thereby became liable for the fall season of 1946; and that the question whether plaintiff was "wrongfully discharged" was one of law under the uncontradicted evidence. There is no contention that the instruction is erroneous because it omitted any other defense. We do not believe that on the points urged the instruction misled the jury. The jurors knew that the disputed commissions were for the fall 1946 line. There was no dispute that plaintiff was employed by defendant in the latter part of 1943, that he continued to work for it until his discharge by the letter of May 4, 1946, and that he was paid in full for the services rendered except those rendered in connection with the fall 1946 line. There is no disagreement as to the construction of the contract. Under the instruction the jurors would understand that two of the questions to be determined were whether defendant employed plaintiff to sell its fall 1946 line, and if so, whether defendant wrongfully discharged plaintiff. We find that these issues presented questions of fact for the jury. In M. Heminway & Sons Silk Co. v. Porter, 94 Ill. App. 609, the court said (611):

> "The next inquiry is as to whether the appellee was wrongfully discharged on October 20, 1893. That was purely an issue of fact."

See also Campbell v. Fierlein, 134 Ill. App. 207; Trevellick v. Western V. M. Ass'n., 237 Ill. App. 493; Baker v. Mode Millinery Co., 193 Ill. App. 507 (abst.); and Nelson v. Hemlandet Co., 201 Ill. App. 515, (abst.).

For the reasons stated the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

44824

ELMER JORDAN, doing business as Elmer Jordan & Company, WILLIAM A. DEAR and JACOB BEEDERMAN, Appellants, v. CHARLES ANAGNOST and PETER G. SHEPIS, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover a real estate broker's commission of $3750.00. Trial without jury resulted in a finding against plaintiffs and judgment was entered accordingly. Plaintiffs have appealed.

In March, 1948, defendants and their wives owned the property at the southwest corner of Madison and Paulina streets in Chicago. Plaintiffs Dear and Jordan, real estate brokers, advertised it for sale. Florence and Jack Rosenfeld saw the advertisement, spoke to Dear, examined the property, signed an offer to purchase for $75,000.00, and gave their certified check for $5000.00 earnest money to Dear. The offer was written in long hand and contained a provision that the Rosenfelds needed a loan of $45,000.00 to make the purchase and would have the privilege of mortgaging the property to effect the loan. This instrument and the check were taken to Anagnost's attorney. He rewrote the offer in type but excluded the provision covering the loan of $45,000.00

He told Jordan that if he wanted a commission the contract would have to call for "all cash". The attorney gave his receipt for the earnest money check payable to Chicago Title and Trust Company. The typed offer in the form of a contract to purchase was signed by the Rosenfelds and given to Anagnost who signed it. Neither Anagnost's wife nor Shepis or his wife signed the instrument. Anagnost cut off the corner of the instrument containing his signature and returned the instrument to Dear and Jordan. The Rosenfeld offer was rejected, the earnest money refunded, and this suit followed.

Plaintiffs contend the "verdict" and judgment are against the manifest weight of the evidence, contrary to law, and against the "preponderance" of the evidence. There was no verdict and the question of preponderance was for the trial court. We shall consider whether the finding against plaintiffs was against the manifest weight of the evidence.

Plaintiffs were required to prove the brokerage contract and the procurement of the purchasers ready, willing, and able to buy according to the contract terms. The record shows that the Rosenfelds were ready, willing, and able to buy. They were procured by Dear and Jordan. The only question relates to the contract of brokerage.

We think the record clearly shows that the brokers had conversations with Anagnost about selling the property prior to advertising it for sale. After talking with him, they talked to defendants' manager of the property about the sale and about his sharing the commission. They presented the Rosenfelds' offer in writing to Anagnost. He

directed them to his attorney, Hill, to prepare a typewritten offer. Whether this was done because Anagnost could not read the original handwritten one or because of the mortgage provision therein is unimportant, as to him, because he signed the typewritten offer. Presumably the offer was satisfactory to him and his signature is strong evidence of the existence of a previous contract between him and the brokers.

Both Shepis and Anagnost deny that Shepis was present at any of the conversations concerning the brokerage. They deny that they discussed, between them, the sale of the property before the contract of purchase was submitted to Shepis. Attorney, Hill, was witness for plaintiffs, who are bound by his testimony that he did not represent Shepis and had not talked with him about the pending deal. There is no basis for any inference that Shepis signed the instrument before Anagnost mutilated it. We think the conflict in the testimony as to Shepis' part in the contract negotiations was for the trial court to resolve. The question of the credibility of the witnesses on the issue was for the trial court. Spangler v. Bell, 390 Ill. 152. Presumably the court resolved the conflict in favor of Shepis. This was justified.

Plaintiffs sued defendants jointly upon a brokerage contract they alleged was made with both. This was the theory of the plaintiffs both in pleading and in proof. There was no request for separate findings. The evidence does not show a contract of brokerage with Shepis. The finding of the

trial court was against plaintiffs on their suit against both defendants on a joint contract of brokerage. The question of Anagnost's individual liability is not before us.

Plaintiffs, on authority of Joice v. Norman, 192 Ill. App. 285 (cited to a note in 169 A. L. R. 616) suggest that the fact that his wife would not sign did not excuse Shepis from liability. This is beside the point in view of our conclusion as to Shepis.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

44844

FULLER B. LIDDELL, CHARLOTTE TRIPP, WARREN LORENZ and CLYDE LORENZ, d/b/a L. & L. Steel Company, Appellees, v. SOL ZIMMERMAN, d/b/a Micro Shear and Fabricating Company Defendant, and E. L. SNYDER, Appellant.	APPEAL FROM COUNTY COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover the purchase price of a shipment of sheet steel. The court without a jury found for plaintiffs and entered judgment against "Sol. Zimmerman and E. L. Snyder, a K a Eli Snyder", for $1002.32. Defendant Snyder has appealed.

Plaintiffs are steel jobbers who began to ship steel to Snyder, a scrap dealer, in 1946. The shipments were made until February, 1947, to Snyder's company, the Snyder Iron and Steel Works. The shipments were paid for by Snyder within a ten day discount period. Starting in February, 1947, five shipments of steel were made to the Micro Shear & Fabricating Company. They were carried under the Snyder company's account in plaintiffs' ledger. No further shipments were made to the Snyder company. Beginning in February, 1947, the shipments to Micro were ordered by Zimmerman. He and Snyder are brothers-in-law. The last shipment was made September 10, 1947. The shipment was not paid for and plaintiffs, after demanding payment, sued for $1,495.06.

The judgment is for less than the alleged purchase price of $1495.06. The record shows that the court believed Zimmerman's testimony that less than the amount ordered was shipped and the steel received was not of the quality covered by the invoice.

The complaint was amended after the close of proofs. Issues were made on the two counts. The first count is in two paragraphs, the first of which alleges that the steel was shipped to Zimmerman at his request and that he was indebted to plaintiff for the shipment. The second paragraph alleged an original undertaking on the part of Snyder to be personally responsible for the payment of the steel shipped to Zimmerman and that Snyder's undertaking induced the shipment, was consideration therefor, and that plaintiffs relied solely upon the promise. Count 2 alleges a partnership liability on the part of Zimmerman and Snyder operating the Micro company. The trial judge said he was entering judgment against "both of them" because, though the partnership had been terminated, there was no notice in writing to the plaintiffs. The judgment order recites that the judgment is on "both and each" of the two counts.

If Zimmerman was liable under paragraph 1, Snyder could not be liable on an original undertaking under paragraph 2. The reverse is true. If Snyder was liable on an original undertaking, Zimmerman was not liable under paragraph 1. There is no theory upon which both could be jointly liable under count 1. The judgment is joint and must rest, if at all, upon count 2, which charges the partnership. We shall

not consider the contentions made as to Snyder's individual responsibility under the alleged original undertaking theory advanced in paragraph 2 of count 1.

Snyder contends that there is no evidence of the existence of a partnership. There is evidence that Zimmerman and Snyder were in partnership with a third person under the name of Steel Fabricating Company. This company terminated in December, 1946. We think the question of notice of its termination is irrelevant. Plaintiffs' records contain no account under that partnership name. There is no evidence of any orders under that name. Our inquiry is limited to the question of evidence of the existence of a partnership between Zimmerman and Snyder under the name of the Micro Shear and Fabricating Company.

Plaintiff Liddell testified that Snyder told him he wanted to get more steel, for a venture "in which he was interested", for fabrication and would be personally responsible for all bills incurred, and that shipping instructions followed later on. In February plaintiffs received a Purchase Order carrying the printed name of the Micro company. Above the printed name Zimmerman had printed in ink, "FORMERLY SNYDER & STEEL WORKS". The order is signed by Zimmerman. Presumably the other four orders were submitted in the same way. The receipt for the September 10, shipment of steel is signed by Zimmerman for the Micro company. After thirty days following the September 10, shipment Liddell called Snyder. He says he asked Snyder for payment and that Snyder told him not to worry, that it would be taken care of, and

that Snyder had taken a financial loss on the deal. This is all the evidence that can be said to bear upon the existence of a partnership. There is no evidence to show what "interest" Snyder had or that Snyder approved the inked memorandum on the Purchase Order. The telephone conversation testified to by Liddell does not tend to prove a partnership. The adding of the name of the Micro company to the Snyder Steel and Iron Works in plaintiffs' ledgers is of no value in making proof of a partnership. It is our conclusion that Snyder's contention is sound. Plaintiffs failed to make a prima facie showing of the existence of a partnership of Zimmerman and Snyder in the Micro company.

Judgment is reversed and cause remanded with directions to find for defendants and against plaintiffs on count 2 and to grant defendant's motion for a new trial, and take such further proceedings as may be proper, on count 1.

JUDGMENT REVERSED AND
CAUSE REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

44721

WILLIAM C. BENDER AND COMPANY, Appellant, v. EMIL TRITZ, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a licensed real estate broker, filed its claim for commissions against defendant in the Municipal Court of Chicago. At the close of plaintiff's case the court, in a trial without a jury, entered judgment for defendant, from which plaintiff appeals.

On December 28, 1945 plaintiff and defendant entered into a written contract whereby plaintiff was given the exclusive right, for a period of 30 days, to find a purchaser for defendant's tavern business and building located in Chicago, Illinois, at a price of $14,000 net to the defendant. Any sum received over and above this amount was to be plaintiff's commission. The contract provided for a minimum down payment of $7,000, with a mortgage back to the seller for the balance payable at the minimum rate of $100 a month with interest at 5%.

Plaintiff advertised the property, and after certain negotiations between its agent, John Rakstang, and a prospective purchaser, Nicholas Parisi, the latter signed a contract to purchase the property for $15,000

and deposited as earnest money the sum of $1,000. Plaintiff presented the contract and tendered the earnest money to defendant, but the latter refused to sign the contract of sale or to accept the earnest money, stating that he would not execute the contract because he wanted the property and business for his son.

It is well settled law that a real estate broker has earned his commission when he has procured a purchaser ready, willing and able to buy, and he cannot be deprived of his commission if the seller refuses to consummate the sale. Pusey v. Varland, 224 Ill. App. 35, 38; Fox v. Ryan, 240 Ill. 391. The trial court was apparently of the opinion that the evidence did not establish that the prospective buyer was financially able to complete the purchase. The evidence adduced by the plaintiff was to the effect that the purchaser had $4,000 cash, $1,000 of which had been deposited as earnest money. He produced a second mortgage letter of commitment for $2,000 and had more than $2,000 in cash surrender values in two life insurance policies, which sum of money would have been available in ten days from the date of surrender of his policies. Proof as to the cash surrender value of the life insurance policies was competent. A purchaser of real estate is to be considered ready, willing and able to buy if he has agreed to purchase the property and has sufficient funds on hand or if he is able to command the necessary funds with which to complete the purchase within the time allowed by the offer. McCabe v. Jones, 141 Wis. 540, 124 N.W. 486. Ability to command necessary funds to purchase was demonstrated and the plaintiff made a prima facie case which, in the absence of contrary proof,

would have entitled him to a judgment. The finding of the court was clearly erroneous. Accordingly, the judgment of the Municipal Court of Chicago is reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer and Feinberg, JJ., concur.

44783

MORTON R. FERDINAND, a Minor, by DAVID L. FERDINAND, his father and next friend, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
RUTH MARGUERITE THREEWITT, also known as RUTH MARGUERITE FERDINAND, Appellant.	)	COOK COUNTY

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Morton R. Ferdinand, a minor, by David L. Ferdinand, his father and next friend, filed his complaint against Ruth Marguerite Threewitt, also known as Ruth Marguerite Ferdinand, for annulment of the marriage of the parties. The cause was heard on the original complaint and the pro se answer of the defendant. From a decree of annulment of the marriage, defendant appeals.

The germane part of the complaint alleges:

> "3. At the time of said marriage the plaintiff had not attained the age of 21 years but was at the time only 18 years of age, he having been born on the 20th day of April 1929, that he has not yet attained the age of 21 years; that at the time of said marriage the defendant was at the age of 21 years."

The answer to this paragraph:

> "3. Admits that at the time of said marriage the plaintiff was 18 years of age. Admits that this defendant was at the age of 21 years at said time.
>
> "Wherefore, defendant asks to be dismissed."

The decree found:

> "* * *
>
> "3. That on the 26th day of January, 1948, at Oak Park, Illinois, the parties hereto went through

a ceremony of marriage.

"4. That said marriage is voidable and should be held null and void by this Court.

"5. That the parties to said marriage did not cohabit as husband and wife subsequent thereto."

Defendant contends that the marriage of a male person between the ages of 18 and 21 years, even without the consent of his parents, is a valid marriage, with which contention we are in accord. Reifschneider v. Reifschneider, 241 Ill. 92. No question as to cohabitation was raised by the pleadings.

Plaintiff has filed no reply brief in this case, but has filed a confession of error to the effect that the complaint which was filed in the Superior Court of Cook County was insufficient to sustain the decree of annulment. He asks, however, that the cause be reversed and remanded and that plaintiff be given leave to file an amended complaint setting forth certain additional facts. On the face of this record the plaintiff is not entitled to any affirmative relief. The decree of the Superior Court of Cook County is accordingly reversed.

REVERSED.

Niemeyer and Feinberg, JJ., concur.

44228

SAMUEL J. GRAFFE, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
MARCELLA GRAFFE, Appellee.	)	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint for divorce. Defendant filed a cross-complaint for separate maintenance. Upon final hearing a decree for divorce was entered in favor of plaintiff and the cross-complaint dismissed for want of equity. Upon appeal, this court (Second Division) reversed and remanded the decree with directions "to enter a decree dismissing plaintiff's amended complaint for want of equity and granting a decree of separate maintenance to defendant upon her counterclaim, and for further proceedings in the matter of the additional amount to be allowed her for her support and solicitor's fees." Graffe v. Graffe, 317 Ill. App. 379 (Abst.).

Pursuant to the mandate of this court, upon a further hearing in the Superior Court a decree for separate maintenance was entered in favor of defendant upon her cross-complaint, in which the court found that defendant expended the sum of $101.04 for court costs. It also found that defendant expended the sum of $350.00

for attorney's fees and was entitled to recover said sum from the plaintiff; that defendant was entitled to recover from the plaintiff the sum of $200.00 as additional attorney's fees. It directed the plaintiff to pay defendant $12.00 per week for her support and maintenance; that a judgment be entered for the sum of $101.04, costs expended in the Appellate Court, and that execution issue thereon; and that plaintiff pay defendant $550.00 for attorney's fees at the rate of $30.00 per month in addition to the weekly alimony. The decree was entered December 16, 1943.

On June 5, 1946, a petition was filed by defendant for a rule to show cause why plaintiff should not be held in contempt for failure to comply with the decree. Plaintiff answered said petition, and the petition and answer were referred to a master to report his findings of fact and conclusions of law. The master, upon a hearing, found and reported that there was due to defendant, under the decree entered pursuant to the mandate of the Appellate Court, a total of $416.40, and recommended that defendant be adjudged in contempt of court for wilful failure to comply with the decree. Upon a hearing by the chancellor, the report of the master was approved and an order entered finding that plaintiff was in default in the sum of $589.60, which included fees for the master and court reporter, directing him to pay the amount, and adjudging plaintiff to be in contempt of court. From that order this appeal is prosecuted.

The principal ground urged here for reversal of the order is, that the decree having reduced the amount found due to judgment, and ordered execution thereon, it could not now be enforced in equity by contempt proceedings. The obligation of a husband to support his wife is a continuing one, and the transformation of the obligation into a more specific form, such as a decree or judgment to pay, does not change it to an ordinary debt. Barclay v. Barclay, 184 Ill. 375; Rule v. Rule, 313 Ill. App. 108. Moreover, a court of equity has ample power under Section 42, Chapter 22, Illinois Revised Statutes, 1947, to enforce its decree by contempt proceedings. Cohen v. Cohen, 291 Ill. App. 39; Schmidt v. Cooper, 274 Ill. 243, 250.

It is urged by plaintiff that the evidence fails to show that he is in default. The decree entered pursuant to the mandate of the Appellate Court directed the plaintiff to pay alimony, court costs and solicitor's fees found due, from which there was no appeal. Upon examination of the evidence in this record, we find plaintiff made no satisfactory proof of payment of the total amount found due.

The order appealed from is affirmed.

AFFIRMED.

Tuohy, P. J., and Niemeyer, J., concur.

44666

MIDWEST TEA PACKING CO., a corporation, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
	)	COOK COUNTY.
CURRIER-LEE WAREHOUSES, INC., a corporation, Appellee.	)	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its complaint in equity for the reformation of a lease dated October 13, 1939, expiring December 31, 1942, which term was, under an option contained in said lease, extended until December 31, 1944, and by a further extension dated March 6, 1944, the term was extended to December 31, 1946. The complaint alleges that the parties entered into the lease under a mutual mistake of fact that the space to be occupied was in reality only 13,779 square feet, which was 1,221 square feet less than the square feet represented in said lease. It also alleges that the defendant knew that there were only 13,779 square feet of space to be occupied by plaintiff but falsely represented it, verbally and in the lease, to be 15,000 square feet. The complaint prays for a reformation of the lease and for an accounting of the excess rent paid per square foot for the space occupied by plaintiff.

Attached to the complaint, as an exhibit, is a copy of the lease dated October 13, 1939, in which the space is described as "The entire second floor of Currier-

Lee Warehouses, Inc.'s warehouse 'D', comprising a total of fifteen thousand (15,000) square feet 'gross' floor space * * * to be occupied for office, warehouse, manufacturing 'such as Lessee has heretofore done' in the above described premises, and shipping room purposes, and for packaging of products and for no other purpose whatever." It is thus apparent from the language quoted that before the lease in question plaintiff had occupied the premises in question -- for what length of time and over what period are not disclosed.

A written motion to strike the complaint was filed, and upon a hearing the court struck the complaint and dismissed the same for want of equity. The only question upon this appeal is whether the complaint states a cause of action in equity.

The defendant urges that the complaint is wholly insufficient because it does not state grounds for reformation of the instrument. To reform a written instrument in a court of equity, it must clearly appear by allegation of fact that the mistake is one of fact, mutual and common to both parties, and in existence at the time of the execution of the instrument, showing that at such time the parties intended to say a certain things and by mistake expressed another. Amberann Corp. v. Old Ben Coal Corp., 395 Ill. 154; Spies v. DeMayo, 396 Ill. 255; Harley v. Magnolia Petroleum Co., 378 Ill. 19. The averment in the complaint, that the defendant falsely represented in the verbal representations as well as in the lease that

the space contained 15,000 square feet, is wholly inconsistent with the legal requirement for relief that the parties intended to say a certain thing and by mistake expressed another. There can be no mutual mistake of fact where there is false representation by the one charged. Morgan v. Owens, 228 Ill. 598, 603. A mistake on one side may be ground for rescinding but not for correcting or rectifying an agreement. Morgan v. Owens, supra; Hoops v. Fitzgerald, 204 Ill. 325.

It is equally clear to us that the complaint is insufficient, because it is apparent from the complaint that the plaintiff occupied the space in question for a period of about seven years under the written leases, and for some time prior to the written leases, and had ample time in which to discover what the actual space demised amounted to. It required only the simple act of measurement. In equity, plaintiff is guilty of laches in making its claim of fraud and misrepresentation. Plaintiff seeks to avoid the doctrine of laches by suggesting that it did not discover the falsity of the representation until 1946, when a survey was made by it. Plaintiff relies upon Gordon v. Johnson, 186 Ill. 18; Keeley v. Sayles, 217 Ill. 589, and other cases, in which the doctrine is stated that in actions for reformation of an instrument because of "mutual" mistake of fact, laches does not begin to run except from the time of the discovery of the fact which entitles them to reformation of the instrument. We have no

disagreement with the cases cited, but they are not applicable, since they are cases where reformation is sought and the equitable ground of "mutual" mistake of fact exists.

The order of the Superior Court is affirmed.

AFFIRMED.

Tuohy, P.J., and Niemeyer, J., concur.

44732

HENRY GOLD, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
ROBERT G. BOLAND and OLE RODSETH, doing business as RODSETH TRUCKING COMPANY, Appellants.	)	COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants for personal injuries, charging them with negligence. A trial with a jury resulted in a verdict for $4500 against defendants. In addition to the general verdict, the jury answered a special interrogatory, finding that plaintiff was not guilty of negligence which proximately caused or contributed to cause the injury. Defendants made no motion for a new trial, but their motion for judgment notwithstanding the verdict was overruled and judgment upon the verdict entered, from which they appeal.

Plaintiff was a pedestrian, walking from north to south on the west crosswalk of Newberry Avenue at the intersection with Roosevelt Road. Roosevelt Road is approximately 90 feet wide. It has streetcar tracks in the center, and the distance between the north rail and the north curb is about 35 feet. The record discloses that there were automobiles parked at an angle at the north curb of Roosevelt Road and immediately east of Newberry Avenue, almost to the next block east of Newberry Avenue, known as Halsted Street, which intersects Roosevelt Road. There was some evidence that cars were double-parked in front of a store at the northeast corner of Newberry Avenue and Roosevelt Road. There is a sharp dispute in the

evidence as to whether plaintiff walked into the side of the truck which collided with him, or whether the front end of the truck struck him while he was in the crosswalk. Defendants argue that two police officers, claiming to be eyewitnesses to the accident, testified that plaintiff was struck by the stake body that protrudes at the rear of the cab, and that plaintiff was the one who came in contact with the truck. Defendants also urge that there are serious contradictions in the testimony of plaintiff as to whether he looked for approaching traffic from the east; that plaintiff's testimony demonstrated that he did not look to the east and therefore did not see the approaching truck in question; and that there was nothing to obstruct his vision. Plaintiff points out that the record shows these police officers, in a written report of the accident made several hours after the occurrence, reported that the truck struck the man, and that there was nothing in the report referring to the plaintiff walking against the truck.

What degree of credibility was to be attached to the testimony of these police officers, in the light of the written report they made, and what credibility was to be given to the testimony of plaintiff were primarily and essentially questions of fact for the jury. Schneiderman v. Interstate Transit Lines, 394 Ill. 569; 331 Ill. App. 143, affirmed 401 Ill. 172.

The Supreme Court in Moran v. Gatz, 390 Ill. 478, 486, said:

> "The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury

> whether he was in the exercise of ordinary care for his own safety."

Particularly is this rule to be applied in a case where the Motor Vehicle Act governs the instant intersection, where the accident occurred, and about which the jury was properly instructed. The Motor Vehicle Act, Ch. 95½, par. 171, §74, Ill. Rev. Stat. 1947, provides:

> "Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, ***."

There is no attack made here upon instructions given, nor is the size of the verdict questioned. In passing upon the correctness of the trial court's ruling upon the motion for judgment notwithstanding the verdict, we cannot weigh the evidence. The well settled rule is that the evidence, and all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff, and the only question is whether there is any evidence fairly tending to prove plaintiff's claim. Shannon v. Nightingale, 321 Ill. 168; Hunter v. Troup, 315 Ill. 293, Schneiderman v. Interstate Transit Lines, supra. We find the evidence in the record amply sufficient to sustain the verdict.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Tuohy, P.J., and Niemeyer, J., concur.

44741

CARL F. KRUEGER, Appellant,	)	
v.	)	APPEAL FROM
	)	CIRCUIT COURT,
HENRY F. BAUMGARTNER, et al., Defendants.	)	COOK COUNTY.
FLORENCE A. BAUMGARTNER, Appellee.	)	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint for want of equity, which sought to have a deed to Henry F. Baumgartner and Florence A. Baumgartner, his wife, as joint tenants, though absolute on its face, declared a mortgage, and to redeem from said mortgage. The cause being at issue, it was referred to a master to report his conclusions of fact and law. The master recommended that the complaint be dismissed for want of equity. The question presented to us upon this appeal is whether the findings of the master and the decree of the court are against the manifest weight of the evidence.

Plaintiff was married to Katharina Krueger, who was the mother of defendant Henry Baumgartner, born to her of a previous marriage. Before the report of the master was filed, Katharina Krueger died on January 17, 1948, and defendant Henry Baumgartner died on March 9, 1948. Katharina Krueger did not testify upon the hearing.

Plaintiff was the owner of two pieces of property, adjacent to each other, in the City of Chicago, on each of which there was a mortgage to secure an indebtedness of the plaintiff. The particular real estate in question had a

mortgage of $12,000 to secure an indebtedness of that amount, dated October 10, 1925, maturing November 15, 1930, and a junior mortgage to secure an indebtedness of $5,000 upon the same real estate. The Continental bank acquired the first mortgage and notes secured thereby on February 18, 1933, and in 1936, plaintiff, being in default on taxes and principal, advised the bank that his several efforts to refinance the property had not been successful. On October 22, 1936, the bank filed suit to foreclose the mortgage, claiming $14,325.82 due. Plaintiff was then seventy-two years of age, unemployed, and owned no property except the real estate in question and the adjoining building, which was then subject to a mortgage of $9,000, also owned by the same bank. It was then that plaintiff asked defendant stepson to assist him in his financial difficulty.

Plaintiff's version was that he asked defendant to loan him enough money with which to refinance the property. Defendant, with the plaintiff, tried to refinance the property with other finance companies but did not succeed.

Defendant's version was that the plaintiff, unable to refinance the property and in fear of a possible deficiency decree against him in the foreclosure proceeding, which would be a lien against plaintiff's interest in the adjoining property, requested defendant to purchase the property to avoid such a deficiency decree and thus protect plaintiff's interest in the adjoining property. There was a sharp conflict in the testimony.

It appears from the evidence that defendant succeeded on his own credit, and that of his wife, to borrow enough money to pay over to the Continental bank $2,350 to

cover the amount required by the bank. He paid up the defaulted taxes and secured a new loan from the Continental bank of $11,500. The foreclosure proceeding was settled. To permit the new mortgage to the Continental bank, plaintiff caused the title to the property to be conveyed to the defendant and his wife on April 7, 1937, the title then having been held in trust by the Pioneer Trust and Savings Bank. On April 30, 1937, defendants went into possession of the premises and have occupied it continuously. The defendants collected the rents from the tenants in the property. Plaintiff, who had been living in the building in question, moved to his adjoining property on April 29, 1937. Defendants have paid up all of the taxes, made various repairs and paid the interest on the new mortgage to the Continental bank. The principal amount of the new mortgage was paid in full by them on May 15, 1940, and was released. It also appears that in October, 1940, defendants employed plaintiff as a janitor for the property at a salary of $20.00 per month, and in October, 1944, defendants discharged plaintiff because his work was unsatisfactory and because of his quarrels with the tenants of the building.

The evidence clearly establishes the value of the property at the time of the deed to these defendants to be not in excess of $15,000. This action was not brought until April 2, 1948, eleven years after the transaction in question.

The burden of asserting and proving that a deed, absolute on its face, should be declared a mortgage rests upon the plaintiff, and it must be by proof, clear and convincing. Kulik v. Kapusta, 303 Ill. 208; Tepper v. Campo, 398 Ill. 496.

When defendants gave plaintiff notice to vacate the premises, which he apparently accepted without protest and moved into his adjoining building, and when he was employed as a janitor and later discharged by defendants, it would be most natural to expect that he would then assert his claim, protest against the assumption of possession and ownership of the property by defendants, and assert his rights then, instead of waiting to do so after there had been some increase in the valuation of the property by the natural development in market values.

In our review of the evidence, plaintiff's claim and his evidence not only lack conviction, but under all the circumstances disclosed, the master could not have found differently than he did. The evidence amply sustains his findings, and the court was justified in approving his report and entering the decree.

The decree is not against the manifest weight of the evidence and is therefore affirmed.

AFFIRMED.

Tuohy, P.J., and Niemeyer, J., concur.

44754

LANDON L. CHAPMAN,
Appellee,

v.

JAMES TREMBOIS,
Appellant.

Appeal from
County Court,
Cook County.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, a member of the bar, brought suit against defendant to recover an unpaid balance of attorney's fees. The complaint alleged that on February 16, 1946, plaintiff was employed by defendant to render professional services to defendant at the price of $10.00 per hour, involving a claim and suit of defendant against the Standard Railway Equipment Manufacturing Company; that pursuant to such employment and at the instance and request of defendant, plaintiff rendered the services shown by two statements attached as Exhibits A and B, dated December 9, 1947, and December 16, 1947, respectively; that defendant is indebted to him in the sum of $165.12 and has failed and refused to pay the same.

Defendant, not a lawyer, appeared pro se. He filed a second amended answer and counterclaim, which, among other things, alleged that defendant denies that plaintiff, pursuant to such employment, rendered all or any of the services alleged to have been rendered in Exhibits A and B of the complaint.

Plaintiff's motion to strike the second amended answer and counterclaim was heard by the court, and an order was entered striking the amended counterclaim and dismissing the same and allowing the answer to stand. The cause was set for hearing for November 15, 1948, with a jury. On September 22, 1948, plaintiff filed a motion for a bill of

particulars, pursuant to notice to the defendant, alleging that the second amended answer did not sufficiently and explicitly deny the averments of paragraph 3 together with the Exhibits A and B attached to the complaint. On September 22, the court heard the motion and entered an order reciting that, pursuant to notice, the defendant not appearing, defendant was ordered to file within ten days a bill of particulars under oath, "specifically and explicitly admitting or denying each allegation set forth in plaintiff's paragraph 3 and each fact alleged in plaintiff's Exhibits A and B." On October 5, plaintiff mailed a notice to the defendant that he would appear on October 7 and ask for judgment for the amount of plaintiff's claim, because of the failure to file a bill of particulars. On October 7, defendant not appearing, the court entered judgment for failure to comply with the order of September 23. On October 26, defendant filed his written motion to vacate the judgment, and upon a hearing on November 8, the court denied said motion. On November 9, 1948, defendant filed an amended motion to vacate said judgment, and on November 12, the court again denied said motion to vacate. The appeal is from the final order and judgment entered October 7, 1948.

The notice of appeal does not include an appeal from the orders of the court denying the motions to vacate but is limited to the appeal from the judgment order of October 7. This appeal presents for review only the judgment order and not the orders denying the motions to vacate. Under the Practice Act, Ch. 110, §37, Ill. Rev. Stat. 1947, the court had the power, upon motion made by plaintiff, to

determine whether defendant should furnish plaintiff a bill of particulars specifically denying each item set forth in the complaint and the exhibits. Notice of the motion was properly served upon defendant. Defendant failed to appear, and the court ordered him on September 22, 1948, to file a bill of particulars within ten days. Having failed to comply with the order, the court, pursuant to notice served on defendant, entered the judgment appealed from. There was no appearance on the motion for the judgment and no showing then made to the court in opposition to the motion. Upon the state of the record before us, there is no such showing made as would justify our interference with the entry of the judgment.

Accordingly, the judgment is affirmed.

AFFIRMED.

Tuohy, P.J., and Niemeyer, J., concur.

43981

GEORGE LOVERDE and VITO LOVERDE, Appellants, v. CONSUMERS PETROLEUM COMPANY, a corporation, Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

A

32

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is the second appeal of plaintiffs from adverse judgments in their actions for damages to the building of George Loverde and the grocery and market of Vito Loverde in the building caused by the ignition of fuel oil which defendant was delivering to storage tanks located in a storeroom in the basement of the building. On the first appeal (327 Ill. App. 210 (abst.)) the judgment was reversed because of error in a certain instruction given on behalf of defendant, the court holding that the verdict in favor of the defendant was not against the manifest weight of the evidence. On the second trial the case was submitted to the jury upon substantially the same evidence. A verdict for defendant was returned and judgment entered thereon. The facts are fully stated in the former opinion and will not be repeated. We agree with the holding in the former opinion that the verdict is not against the manifest weight of the evidence.

Objection is made to the giving of a number of instructions on behalf of the defendant. Many of these objections are merely technical and we do not feel that

material injury resulted to plaintiffs from the court's rulings on the instructions, practically all of which are stock instructions. Objection is made to instruction No. 5, which required plaintiffs to prove that defendant was guilty of some negligent act or omission charged in plaintiffs' complaint, and that such negligence of the defendant was the proximate cause of the accident and damage to the plaintiffs, on the ground that there is no instruction specifically stating the negligence charged in the complaint. Buehler v. White, 337 Ill. App. 18. However, instruction 17 given on behalf of plaintiffs sufficiently details the charges of negligence upon which the plaintiffs rely. Instruction No. 2 has been condemned as argumentative, but is frequently given. Repetitions complained of in various instructions do not warrant reversal. Instruction No. 10 told the jury that if the alleged damage to the plaintiffs was accidental and neither the plaintiffs nor the defendant were negligent, the plaintiffs could not recover. Instructions relating to damages caused by accidents have too frequently been given when not applicable to the facts in the case, and the giving of such instructions under those circumstances has been repeatedly condemned. The instruction now complained of protected plaintiffs and defendant by requiring that the rule stated should be applied only in the event both plaintiffs and defendant were free from negligence. Instruction No. 5 tendered by plaintiffs and refused by the court related to the credibility of the witnesses. It is a stock

instruction and the court might have given it. We do not consider its refusal to be reversible error. Other objections raised by plaintiffs, such as the alleged error of the court in denying plaintiffs' motion for a judgment notwithstanding the verdict, do not require further comment in view of the opinions heretofore expressed.

The judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

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11-28	K. Nelson	44577	6178
12/20/78	J. Barry	[redacted]	3
5/25	Dr. Tilke		
	I. Stein	47004	
7/17/79	D. Fanta	44922	
	D. Kelly	372	2000
2/27	J. Brown	644	3700
3-10	[illegible]	[illegible]	[illegible]
4/22	T. Sabatis	332	3267
[illegible]	[illegible]	222	0800

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